Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of ACS of Anchorage, Inc. Pursuant to	)	
Section 10 of the Communications Act of 1934, as	)	WC Docket No. 05-281
amended, for Forbearance from Sections 251(c)(3)	)	
and 252(d)(1) in the Anchorage LEC Study Area	)	
	)	

ERRATA TO COMMENTS OF MATANUSKA TELEPHONE ASSOCIATION, INC.

Matanuska Telephone Association, Inc. ("MTA"), by its undersigned counsel, hereby files this Errata to its Comments on the Petition of ACS of Anchorage, Inc. ("ACS") which were filed on January 9, 2006 in the above-referenced docket. MTA's Comments contained two exhibits, with **Exhibit A** being an order of the Regulatory Commission of Alaska in Docket U-05-46. The wrong order from that docket was attached as **Exhibit A**. The correct **Exhibit A** is attached to the comments, which are hereby being refiled. Other than substituting the correct **Exhibit A**, no other change has been made to MTA's filing.

Respectfully submitted

MATANUSKA TELEPHONE ASSOCIATION, INC.

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January 10, 2006

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COMMENTS OF MATANUSKA TELEPHONE ASSOCIATION, INC.

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SUMMARY

ACS has demonstrated that it qualifies under the standards of section 10(a) of the Communications Act of 1934, as amended (the "Act"), for forbearance from the unbundling obligations of section 251(c)(3) of the Telecommunications Act in the Anchorage local exchange market. The petition provides compelling evidence that the Anchorage market has strong intermodal competition meeting the standards established by the Commission in the recent *Qwest Forbearance Order* for the limited forbearance sought by the incumbent. Significantly, GCI will not be impaired in competing in the Anchorage market without access to ACS' UNE loops; instead, it has elected not to complete development of its cable infrastructure in order to compete with ACS on a facilities basis for purely economic reasons. The Regulatory Commission of Alaska has recently ruled that GCI's effort to arbitrage the economic benefits of access to UNEs at TELRIC rates in place of completing its own competitive network in another local exchange service area is not in the public interest. Grant of ACS' petition will advance the goal of the Act to encourage facilities-based competition at the local exchange level. It will also curtail subjecting ACS to inherently unfair asymmetric competition in relation to GCI. Finally, GCI's elective reliance on UNEs in the Anchorage market is not a legitimate basis for the Commission to withhold forbearance from requiring ACS to continue to provide access to unbundled network elements. Section 10(a) is an integral component of the Act's pro-competitive, deregulatory objective and its use should not be avoided where it can have a practical impact on competition in a competitive local exchange market.

Matanuska Telephone Association, Inc. ("MTA"), by its undersigned counsel, hereby comments on the petition of ACS of Anchorage, Inc. ("ACS") for forbearance from sections 251(c)(3) and 252(d)(1) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 251(c)(3), 252(d)(1).[1] For the reasons set forth below, MTA supports ACS's petition for relief pursuant to section 10 of the Act, 47 U.S.C. § 160, and urges the Commission's expeditious approval of the petition.

I. BACKGROUND

MTA is a rural telephone cooperative organized under the Alaska Electric and Telephone Cooperative Act and is certificated by the Regulatory Commission of Alaska ("RCA") to provide local exchange service. MTA was created in 1953 by approximately 40 original members who accepted responsibility for the fledgling telephone service originally provided by the municipality of Palmer. During its 50-year history, MTA has grown to serve approximately 40,000 members spread over some 10,000 square miles. It has approximately 59,000 access lines and in 2004 had consolidated revenues of $87 million.[2]

GCI is a publicly traded company that in 2004 had consolidated revenues of $424.8 million.[3] It considers itself "one of the nation's premier integrated telecommunications providers,"[4] and is the largest such operator in Alaska. GCI holds leading market shares in the state for long-distance, cable television and Internet access services. It has also gained significant market share in the local exchange markets in which it competes. It has

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[1] DA 05-3145, released December 5, 2005.
[2] MTA's wholly owned subsidiaries provide cellular, resold, long-distance, dial-up Internet, DSL and video programming services.
[3] GCI Form 10-K filed with the SEC for the year ending December 31, 2004 ("GCI 2004 Annual Report"), at 17.
[4] GCI Website, www.gci.com/about/index.htm.

approximately 50% of the market in Anchorage, 32% in Juneau and 28% in Fairbanks. GCI also has high name recognition throughout Alaska, and the majority of its customers purchase multiple services from it.[5]

In MTA's rural study area, GCI provides cellular, cable television, Internet access and long-distance services. It recently received authorization from the RCA to provide local exchange service throughout MTA's study area.

Over 11,000 of MTA's local exchange customers subscribe to GCI's cable services, which means that these customers already have a significant customer relationship with GCI. Many of these cable customers also subscribe to GCI's cable modem Internet service. In addition, MTA estimates that over 24,000 of its local exchange customers subscribe to GCI's long distance service. As a result, approximately 40% of MTA's customers have an established relationship with GCI for their telecommunications needs. GCI operates retail store offices throughout the state, including in Palmer, Wasilla and Eagle River, all of which are located in Matanuska's study area.

II. DISCUSSION

A. ACS is Entitled to Forbearance From Section 251(c)(3) of the Act in Anchorage

As evidenced by the comprehensive data assembled in ACS's petition, under the standards set forth in section 10(a) of the Act, 47 U.S.C. § 160(a), ACS is entitled to forbearance from the unbundling obligations of section 251(c)(3) of the Act in ACS's Anchorage study area.[6] ACS has demonstrated that the Anchorage local exchange market is highly competitive, resulting

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[5] GCI 2004 Annual Report, at 19.

[6] Since MTA believes that ACS' petition for forbearance from the obligation to provide access to UNE loops in Anchorage is meritorious, it submits that the Commission does not need to address ACS's alternative request for relief from the pricing standards of section 252(d)(1) of the Act, which would be mooted by grant of ACS' request for relief from unbundling.

in ACS's loss of market share at a pace far greater than the national average for incumbent local exchange carriers.[7] Although the Commission did not publicly disclose the local exchange market share that Cox Cable has won from Qwest in its recent order granting forbearance from section 253(c)(3) to Qwest in the Omaha MSA,[8] GCI's almost 50% gain of market share from ACS in Anchorage must surely meet this standard.

Of equal importance, ACS presents evidence in its petition that GCI's cable system passes some 98% of the homes in the Anchorage market.[9] GCI also maintains high-capacity loops and dark fiber loops of its own throughout the Anchorage market on which it could, but has not, provided service to other carriers.[10] GCI provides all of its own switching services and is collocated in all five of ACS' central offices in the market and in two remote locations where ACS has placed switches.[11] It does not rely on ACS for any transport facilities in Anchorage.

In the *Qwest Forbearance Order,*[12] the Commission held:

> "[In the *Triennial Review Remand Order,*] the Commission announced that it might one day be appropriate to conclude, based on sufficient facilities-based competition, particularly from cable companies, that the state of local exchange competition might justify forbearance from UNE obligations [citation omitted]. Today, that expectation is realized. We find that competition for telecommunications services is sufficiently developed in certain wire centers that the section 251(c)(3) obligation to provide unbundled access to loops and transport is no longer necessary to ensure that, in the Omaha MSA, Qwest's "charges, practices, classifications, or regulations...are just and reasonable and are not unjustly or unreasonably discriminatory"."

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[7] ACS Petition, at 30, n. 134.

[8] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, FCC 05-170, released December 2, 2005 (hereinafter, *"Qwest Forbearance Order"*).

[9] ACS Petition, Exhibit J, at 5.

[10] *Id.*, at 12. GCI services certain office buildings and other major customers in Anchorage using its own fiber facilities.

[11] *Id.* at 10-11.

[12] *Qwest Forbearance Order*, ¶ 63.

This analysis is equally applicable to the situation that exists in the Anchorage market. Further, in the *Qwest Forbearance* Order,[13] the Commission made clear that section 251(c)(3) forbearance is appropriate in a market even where the competitor's network does not cover at all points the same customers that the incumbent's network reaches. In the Anchorage market, where GCI's combination of hybrid fiber coaxial ("HFC") cable and fiber optic plant provides virtually ubiquitous coverage throughout all residential and commercial sectors, even this concern on the part of the Commission warrants little weight.

Moreover, contrary to the broader scope of relief sought by Qwest in the Omaha MSA, ACS is requesting forbearance only from its obligation to provide access to its UNE loops; it has expressly agreed to continue to permit its competitors to resell its services at wholesale rates.[14] Thus, the scope of relief sought by ACS is relatively narrow, and should cause no practical impairment to GCI's competitive position in the Anchorage market.

The fact of the matter is that GCI is not the kind of start-up competitor that section 251(c)(3) of the Act was intended to protect. It does not need to make infrastructure investment decisions before having the benefit of a revenue stream with which to fund such investment. Indeed, it already enjoys a revenue stream greater than that of the incumbent operator, and faces only the decision of whether and when to make the incremental investment needed to upgrade its fully digital, two-way cable network to provide telephone service.

Indeed, approval of ACS's forbearance petition will serve the purpose of the Act, which is to advance facilities-based competition, by encouraging GCI to rely on and develop the infrastructure it has in place as its basis for its competing in the Anchorage market, rather than permitting it to take advantage of ACS's network investment.

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[13] *Id.*, ¶ 70.
[14] ACS Petition, at 3.

B. GCI Will Not Be Impaired in Competing in Anchorage Without Access to UNE Loops

In the *Qwest Forbearance Order*,[15] the Commission found that Cox Cable is providing effective intermodal competition to Qwest in portions of the Omaha market through use of its own, extensively deployed last-mile cable facilities. The record in the instant proceeding demonstrates that GCI has equal capability to that of Cox to compete with the incumbent provider on a facilities basis, but has elected not to do so for economic reasons.[16] In testimony given by GCI to the RCA, as well as in the public statements of GCI's CEO and other executive officials,[17] GCI has made clear both its capability and intention to transition its customers in Anchorage from UNE loops acquired from ACS to its own cable telephony facilities. However, the pace at which it will execute this migration is dependent on the price at which such unbundled facilities are made available.

In effect, GCI's request for access to UNE loops in the Anchorage market is not motivated by any operational impairment, but by a desire to control when and how GCI will make its investment to deploy its own facilities in competition with the incumbent. This clearly is not the purpose that section 251(c)(3) of the Act was intended to serve. MTA submits that the public interest of ACS' petition should be judged in this context.

The Alaska state regulatory commission has made important findings regarding GCI's lack of impairment in the absence of UNEs that should inform the Commission's decision in this proceeding. In its application a year ago to the RCA for certification as a local exchange carrier

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[15] *Qwest Forbearance Order*, ¶ 59.

[16] *See* GCI 2004 Annual Report, at 32: "As a converged platform, cable is a viable competitive alternative outside its traditional video space, not only in the broadband space as a competitor with technology such as DSL, but also in traditional telephony services as voice becomes another application that is carried on data centric networks."

[17] ACS Petition, at 2-3, 7-9, 12-13.

in a number of new markets, including MTA's study area, GCI represented to the state regulatory commission that it is fit, willing and able to provide service throughout the requested service areas without benefit of either UNEs or resale services at wholesale rates.[18] In a supplementary filing to the RCA, GCI affirmed that it was prepared to rely on the HFC lines of its cable affiliate, supplemented only by resale services at retail rates available pursuant to section 251(b) of the Act and, in a few instances, wireless local loop to provide competitive services throughout MTA's and other incumbent carriers' service areas.[19] Based on this representation, the RCA has approved GCI's application to provide local exchange service in a number of its requested markets, including MTA's.

Within a month of filing its application, however, and prior to submission of its March 2005 supplementary filing, GCI formally requested MTA to begin good faith negotiations for unbundled network elements, pursuant to sections 251 and 252 of the Act.[20] In response to this demand, MTA successfully petitioned the RCA under section 251(f)(2) of the Act for suspension of its obligation to provide GCI's access to UNE loops in its service area. In its decision, a copy of which is attached to these Comments as **Exhibit A**, the state commission rejected GCI's impairment argument, finding that it had made inconsistent assertions regarding its need for

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[18] *Application by GCI Communications Corp. for an Amendment to its Certificate of Public Convenience and Necessity to Operate as a Competitive Local Exchange Telecommunications Carrier*, Docket U-05-4; at 3-4.

[19] Docket U-05-4, Letter from James R. Jackson Jr., GCI Regulatory Attorney, dated March 22, 2005, at 3-4.

[20] MTA had lost its rural exemption relative to GCI when it commenced provision of video services.

UNEs to compete effectively in MTA's market, including in its original application for certification.[21]

Although GCI had given testimony – similar to the representations cited by ACS in the present petition – that it intended to migrate its subscribers in MTA's study area to its own cable facilities, the RCA found that the economic advantages and decreased risks made available to GCI by its access to UNEs at TELRIC rates created a disincentive for GCI to deploy its own facilities.[22] Taking into account the relative size and scope, financial resources and economies of scale of GCI in relation to MTA, and its greater ability to withstand loss of revenue and market share than the competitor, the RCA concluded that it was not in the public interest to require MTA to provide the larger competitor with access to its UNE loops at TELRIC rates.[23]

MTA's successful case before the RCA included testimony by Mr. Michael Burke, MTA's utility finance expert witness, who demonstrated that GCI's reliance on UNEs, notwithstanding the existence of extensive GCI-controlled network infrastructure, represents a technique for shifting the risk of market development from itself to the incumbent carrier, at the risk of that operator. Mr. Burke's comparative analysis of the economic benefit to GCI from use of ACS UNE-L in the Anchorage, Fairbanks and Juneau markets (copy attached to these Comments as **Exhibit B**) reveals that the cost of payment per unbundled loop at TELRIC rates, weighed against USF receipts and avoidance of access charges, produces a positive cash flow to GCI even prior to consideration of end user revenues that GCI will collect from customers on the

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[21] *Petition for Suspension and Modification of Certain Section 251(c) Obligations Pursuant to Section 251(f)(2) of the Telecommunications Act of 1996 filed by Matanuska Telephone Association, Inc.,* Order U-05-46(8), issued December 20, 2005 ("*MTA S&M Order*"), at 40-41.
[22] *Id.*, at 14.
[23] *Id.*, at 44.

loop. This is true in the Anchorage market even though high cost loop support is nominal.[24] In essence, Mr. Burke showed that the incumbent carrier actually pays GCI to provide local service under the UNE competition scenario, producing a striking competitive advantage to GCI and disadvantage to the incumbent.

In summary, GCI's argument for access to ACS' UNEs in the Anchorage market, consistent with its UNE strategy in general, is not designed to overcome operational impairment, but instead to enable GCI to arbitrage the UNE rate against access savings and USF receipts. This technique affords GCI extraordinary economic choices regarding where and when to target its investments dollars to deploy its own facilities in competition with the incumbent operator. Requiring the incumbent operator to support reducing the risks of its competitor's entry into the market in this manner is clearly a distortion of the original purpose contemplated for UNE competition under sections 251(c)(3) and 251(d)(2) of the Act. This analysis demonstrates the compelling merit of ACS's petition for forbearance from its unbundling obligations in the Anchorage study area, at least in relation to GCI.

C. Grant of ACS's Petition Would Advance Facilities-Based Competition in the Anchorage Market

The Commission has long expressed its preference for facilities-based competition over the use of UNEs.[25] In the *Qwest Forbearance Order*, the Commission acknowledged that

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[24] For rural carriers like MTA, GCI's access to UNEs would have a particularly devastating effect, since the TELRIC price bears no relationship to imbedded revenue streams of high cost support and access charge bypass. When GCI is serving a rural area that is eligible for high cost support, it can arbitrage the UNE rate against the portability of high cost support to create a significant negative cost to provide service.

[25] *See Unbundled Access to Network Elements*, FCC 04-290, released February 4, 2005 ("*Triennial Review Remand Order*"), ¶ 218; *Implementation of the Local Competition Provisions*

permitting new market entrants the right to compete with incumbent LECs by leasing at cost-based rates UNEs of the incumbents own networks constitutes a "high degree of regulatory intervention." Such intervention results in a number of costs, including reducing the incentive of both the incumbent and the competitor to invest in facilities and innovation, and creating complex issues of managing shared facilities.[26] Reflecting this same concern in its decision denying GCI access to UNEs on MTA's network, the RCA quoted the Commission as follows:

> "[W]e have come to recognize more clearly the difficulties and limitations inherent in competition based on the shared use of infrastructure through network unbundling. While unbundling can serve to bring competition to markets faster than it might otherwise develop, we are very aware that excessive network unbundling requirements tend to undermine the incentives of both ILECs and new entrants to invest in new facilities and deploy new technology... ."[27]

Approval of ACS's petition for forbearance will advance this policy objective of the Act in the context of the Anchorage market. The record evidences that GCI has the infrastructure through which to offer facilities-based competition to ACS, and it should be encouraged to make the additional incremental investment necessary to implement such competition in the public interest.

D. It is Not in the Public Interest to Subject ACS to Asymmetric Regulation

In addition to the public interest factors discussed above, denial of ACS' petition would unnecessarily and unfairly prolong asymmetric regulation of ACS and GCI as competitors in the Anchorage market. As a competitive carrier, GCI is not subject to the unbundling obligations of

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of the Telecommunications Act of 1996, 15 FCC Rcd 3696, 3701 (1999); *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 563 (D.C. Cir. 2004).

[26] *Qwest Forbearance Order*, ¶ 76.

[27] *MTA S&M Order*, at 46, citing *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 19020 (2003) ("*Triennial Review Order*").

section 251(c)(3) of the Act faced by the incumbent. Thus, even though GCI operates fiber loops of its own to which ACS and possibly other competitors would like to have access, GCI is not required to provide access to those facilities to its competitors and, in fact, has "vehemently opposed" ACS's request for unbundled loop reciprocity during interconnection agreement negotiations.[28]

Both this Commission and the Alaska state regulatory commission have recognized the inherent unfairness of this circumstance. As stated by the Commission in granting Qwest forbearance from section 251(c)(3) obligations in certain portions of the Omaha MSA:

> "Once the benefits of competition have been sufficiently realized and competitive carriers have constructed their own last-mile facilities and their own transport facilities, we believe that it is in the public interest to place intermodal competitors on an equal regulatory footing by ending unequal regulation of services provided over different technological platforms. Even though Qwest and Cox each provide service over their own facilities to [REDACTED] narrowband customers in the Omaha MSA [footnote omitted], Qwest is subject to unbundling obligations while Cox is not. Our action today places Qwest and Cox on more equal footing in those wire center service areas where facilities-based competition is sufficiently developed such that taking this step to increase the level of parity in the local exchange market is appropriate."[29]

Grant of the pending petition for forbearance will similarly relieve ACS from such inherently unfair asymmetric regulation in the Anchorage market.

E. GCI's Reliance on UNEs in Anchorage Does Not Justify Denying ACS's Petition

In its *Qwest Forbearance Order*, the Commission noted that Qwest's competitors make relatively little use of access to UNE loops in the Omaha market and cautioned that it would be concerned with granting forbearance from unbundling obligations in a market in which

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[28] ACS Petition, at 13-14.

[29] *Qwest Forbearance Order*, ¶ 78. *See also* RCA analysis in *MTA S&M Order*, at 46.

"competition exists []only due to section 251(c)(3)."[30] The Commission cited in support of this curious observation an *ex parte* submission by GCI which argued that "a situation where the primary competitor has relied on UNE-L for customer acquisition raises very different issues than those before the Commission in the instant [Omaha MSA] proceeding." GCI, of course, was attempting to lay the basis for distinguishing the precedential effect of the *Qwest Forbearance Order* from the instant proceeding.

MTA strongly urges the Commission not to follow GCI's reasoning in this case. In the Anchorage market, GCI's ability to compete does not depend on the availability of UNE-L. To the contrary, GCI has chosen, for purely economic reasons, to use the incumbent's UNEs in place of offering facilities-based competition which it admits it is capable of providing. As explained in ACS's petition, GCI has laid out in its testimony to the RCA and in its pronouncements to the investment community its strategy of moving subscribers off of UNE facilities and onto its own cable plant, but only according to its own timetable.

The situation in Anchorage is akin to that identified by the Commission regarding enterprise telecommunications services in the Omaha MSA in the *Qwest Forbearance Order.*[31] Although Cox Cable has not yet made significant inroads in that enterprise market, the Commission concluded that Cox's "possession of the necessary facilities to provide enterprise services, its technical expertise, its economies of scale and scope, its sunk investments in network infrastructure, its established presence and brand in the Omaha MSA, and its current marketing efforts and emerging success" in that market lead to the conclusion that Cox poses a "substantial competitive threat" to Qwest in that sector. As a result, the Commission concluded that forbearance from enforcing Qwest's unbundling obligations for that sector was justified, as

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[30] *Qwest Forbearance Order*, ¶ 68, n. 185.
[31] *Id.*, ¶ 66.

well. In Anchorage, where GCI has made the conscious financial decision not to utilize its existing infrastructure but, nevertheless, for all the reasons identified in the *Qwest Forbearance Order* relative to Cox, poses a substantial competitive threat to ACS in that market, forbearance is equally justified.

In any case, ACS has made it clear in its petition that it will not withhold access by GCI to its UNEs (as GCI has done in response to ACS's request for access), but will ask that GCI negotiate for such access on the basis of commercial rates. Thus, under no circumstances will GCI be deprived of the opportunity to continue to make use of ACS's UNE loops. In addition, ACS is not attempting to withhold access by its competitors in Anchorage to its resale services at wholesale rates.

In the *Triennial Review Remand Order*, the Commission expressly encouraged incumbent LECs to file for forbearance from unbundling requirements where they believe the requirements for forbearance have been met.[32] The Commission would now effectively eviscerate section 10 of the Act if it were to determine that its should not be used in circumstances where its application can have some effect on the competitive market structure.[33] MTA urges the Commission to avoid this illogical result.

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[32] *Triennial Review Remand Order*, ¶ 39.

[33] As the Commission did in the *Qwest Forbearance Order*, the Commission can, in granting ACS's petition, mitigate any short-term disruption to GCI's customers supported by means of UNE-L by providing for a reasonable transition period.

F. ACS Should be Granted Forbearance Throughout the Anchorage Study Area

MTA agrees that the Commission should approve ACS's petition for the entire Anchorage study area.[34] ACS has demonstrated that, in light of GCI's extensive HFC cable and fiber optic plant, GCI's ability to compete throughout the study area is uniform, and forcing ACS to adopt different rates for different portions of the Anchorage market would lead to unnecessarily onerous facilities-sharing management requirements.

MTA is also conscious that selective approval of ACS's request on a wire-center basis can open the door to the competitor circumventing the effect of the Commission's ruling by structuring its network architecture in the Anchorage market to enable it to continue to secure UNE loops usable throughout the study area through a single wire center. In its recently concluded negotiation with MTA for resale services at wholesale rates, for example, GCI attempted to circumvent the parameters of the Commission's local number porting rules by declaring the establishment of a single "mega" wire center capable of serving MTA's entire multi-wire-center service area. This effort was rejected in an arbitrator's ruling.[35]

Grant of ACS' petition throughout the Anchorage study center – which is in any case relatively small in comparison to, for example, the Omaha MSA – will avoid potential efforts of this nature to misapply the Commission's ruling.

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[34] ACS Petition, at 26-29.

[35] *In the Matter of Petition of GCI Communication Corp. d/b/a General Communication, Inc. and GCI for Arbitration with Matanuska Telephone Association, Inc. Pursuant to 47 U.S.C. Sections 251 and 252*, RCA Docket U-05-76, Arbitrator's Decision, dated December 19, 2005, at 16-39.

CONCLUSION

For the reasons set forth above, MTA supports ACS' petition for forbearance from the unbundling requirements of section 251(c)(3) in the Anchorage market, and urges the Commission to move expeditiously in granting the petition in order that ACS may be placed on a fair playing field with its prime competitor at the earliest possible time.

Respectfully submitted

MATANUSKA TELEPHONE ASSOCIATION, INC.

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January 9, 2006

STATE OF ALASKA

THE REGULATORY COMMISSION OF ALASKA

Before Commissioners: Kate Giard, Chairman
Dave Harbour
Mark K. Johnson
Anthony A. Price
James S. Strandberg

In the Matter of the Petition for Suspension and Modification of Certain Section 251(c) Obligations Pursuant to Section 251(f)(2) of the Telecommunications Act of 1996 filed by MATANUSKA TELEPHONE ASSOCIATION INC.	U-05-46 ORDER NO. 8

ORDER GRANTING IN PART, PETITION FOR SUSPENSION AND MODIFICATION AND AFFIRMING ELECTRONIC RULINGS

BY THE COMMISSION:

Summary

We grant MTA's[1] motion for clarification of its petition to suspend obligations imposed by 47 U.S.C. § 251(c).[2] We suspend for a three-year period MTA's obligation to comply with the requirement stated at 47 U.S.C. § 251(c)(3) and provide GCI[3] access to unbundled network elements (UNEs). We also suspend for a three-year period the application of 47 U.S.C. § 251(c)(1), (2), (5), and (6) as they apply to access to unbundled network elements. We deny, without prejudice, those aspects of MTA's petition requesting potential extension of the suspension beyond three years. We affirm

[1]Matanuska Telephone Association, Inc. (MTA).

[2]*Matanuska Telephone Association's Petition for Suspension and Modification of Certain Section 251(c) Obligations Pursuant to Section 251(f)(2) of the Telecommunications ACS of 1996,* filed May 27, 2005.

[3]GCI Communications Corp. d/b/a General Communication, Inc. and d/b/a GCI.

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Exhibit A

our electronic rulings requiring an expedited response to the petition for confidentiality[4] filed by MTA[5] and granting the confidentiality petition.[6] We affirm our electronic rulings denying GCI's motion for expedited consideration[7] of its motion to require post-hearing briefs filed by GCI,[8] and denying GCI's motion[9] to require post-hearing briefs.[10]

Background

The Telecommunications Act of 1996 ("the Act")[11] was enacted to foster competitive local exchange service in historically monopolistic markets, and imposes several duties on local exchange carriers (LECs) to further competitive local exchange markets. 47 U.S.C. § 251(a) and (b) establish general duties for all local exchange carriers, while 47 U.S.C. § 251(c) of the Act imposes additional duties on incumbent local exchange carriers (ILECs).[12]

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[4]*Matanuska Telephone Association, Inc.'s Petition for Confidentiality*, filed October 19, 2005.

[5]On October 20, 2005, all parties were electronically notified of this ruling.

[6]On October 21, 2005, all parties were electronically notified of this ruling.

[7]*Motion for Expedited Consideration of Motion to Permit Post-Hearing Briefs*, filed November 3, 2005.

[8]On November 10, 2005, all parties were electronically notified of this ruling.

[9]*Motion to Permit Post-Hearing Briefs*, filed November 3, 2005.

[10]On November 23, 2005, all parties were electronically notified of this ruling.

[11]1996 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) amending the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*

[12]Specifically, 47 U.S.C. § 251(c) requires the incumbent LEC to (1) negotiate in good faith, (2) interconnect the incumbent's network with the facilities of any requesting telecommunications carrier, (3) provide access to network elements on an unbundled basis, (4) offer for resale at wholesale rates any telecommunications service that the carrier provides at retail, (5) provide reasonable public notice of changes to the carrier's facilities or networks, and (6) provide physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier.

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While the Act was intended to foster competitive local exchange markets, a competing concern was the preservation of universal service and affordable local exchange service in high cost rural areas. In order to recognize the unique needs of rural markets, including the potential effects of certain duties on the ILEC's ability to provide affordable universal service, the Act includes a "rural exemption" that exempts smaller ILECs in rural markets from 47 U.S.C. § 251(c) requirements.[13]

The rural exemption is not absolute, and may be either terminated altogether by a state commission or deemed inapplicable against a local cable operator once the rural telephone company commences video programming service.[14] In 2003 an MTA affiliate (MTA Visions) received authorization to commence video programming service in portions of MTA's service area. GCI, which has an affiliate providing cable television in MTA's service area, filed a formal complaint alleging that MTA's entry into the video programming market resulted in the forfeiture of the right to assert its rural exemption against GCI, citing 47 U.S.C. § 251(f)(1)(C). We determined that MTA's rural exemption no longer applied against GCI in the geographic area defined by MTA

[13] *See* 47 U.S.C. § 251(f)(1)(A).

[14] 47 USC § 251(f)(1)(B) addresses termination of the rural exemption, while 47 USC § 251(f)(1)(C) specifies the limitation on the rural exemption. With regard to the limitation on the rural exemption, 47 U.S.C. § 251(f)(1)(C) provides that the rural exemption "does not apply to a [interconnection] request . . . from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming."

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Vision's certificate, allowing GCI to request 47 U.S.C. § 251(c) interconnection from MTA.[15]

MTA received GCI's request to negotiate an interconnection agreement on February 28, 2005. On May 27, 2005 – before GCI could request arbitration of unresolved interconnection issues[16] - MTA filed a request for suspension of certain 47 U.S.C. § 251(c) obligations.[17] MTA requested relief from 47 U.S.C. § 251(c) duties other than the obligation to provide resale services at wholesale rates and the related duty to negotiate wholesale rates. MTA asked that this suspension remain in effect for

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[15]Order U-04-20(4)/U-04-47(2), *Order Requiring Negotiations; Granting, In Part, Motion to Compel; Denying Motion to Strike, Motion to Dismiss, Motion for Declaratory Relief, and Motion for Directed Verdict; and Affirming Electronic Rulings*, dated February 18, 2005. MTA filed for reconsideration, and we reaffirmed that decision. *See* Order U-04-20(6)/U-04-47(4), *Order Denying Reconsideration and Granting Clarification,* dated April 27, 2005.

Docket U-04-20 is titled *In the Matter of the Request by GCI COMMUNICATION CORP. d/b/a GENERAL COMMUNICATION, INC., and d/b/a GCI for Local Interconnection with MATANUSKA TELEPHONE ASSOCIATION, INC., Pursuant to 47 U.S.C. §§251 and 252.*

Docket U-04-47 is titled *In the Matter of the Petition by GCI COMMUNICATION CORP. d/b/a GENERAL COMMUNICATION, INC., and d/b/a GCI for Arbitration with MATANUSKA TELEPHONE ASSOCIATION, INC., under 47 U.S.C. §§ 251 and 252 for the Purpose of Local Exchange Competition.*

[16]A party to interconnection negotiations may request the state commission to arbitrate unresolved issues during the period from the 135th to the 160th day after the incumbent LEC receives the request to negotiate an interconnection agreement. 47 U.S.C. § 252(b)(1). GCI requested that the Commission arbitrate interconnection issues on the 135th day after requesting interconnection (July 15, 2005), and we opened Docket U-05-76 to address the arbitration request.

Docket U-05-76 is titled *In the Matter of the Petition of GCI COMMUNICATION CORP. d/b/a GENERAL COMMUNICATIONS, INC. and GCI for Arbitration with MATANUSKA TELEPHONE ASSOCIATION, INC., Pursuant to 47 U.S.C. Sections 251 and 252.*

[17]The Act allows an incumbent LEC to request a suspension of or modification to the obligations imposed on LECs by Sections 251(b) and (c). *See* 47 U.S.C. § 251(f)(2).

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three years, with the possibility of two additional one-year periods based on a continued showing of undue economic burden. MTA also requested interim suspension of enumerated 47 U.S.C. § 251(c) obligations pending our final decision on the suspension petition, a request we granted on September 21, 2005.[18] A hearing on the suspension petition was held October 24 through 28, 2005.

MTA presented the testimony of Gregory V. Berberich, Chief Executive Officer; Robert C. Rowe, consultant; Michael C. Burke, consultant; Daniel L. Trampush, consultant; Michael J. Balhoff, consultant; R. Desmond Mayo, Chief Financial Officer; Carolyn K. Hanson, Director of Sales & Marketing; Richard M. Kenshalo, Director of Engineering, Construction and Operations; Alfred L. Strawn, Chief Governance Officer of the MTA Board of Directors, and Thomas M. Strait, consultant. GCI presented the testimony of Dana Tindall, Senior Vice President for Legal, Regulatory, and Governmental Affairs, Charles W. King, consultant; Gregory F. Chapados, consultant, John T. Nakahata, consultant, Emily Thatcher, Director-Regulatory Analysis, and Frederick W. Hitz, III, Vice President for Regulatory Economics and Finance.

Discussion

I. Introduction

While initially exempt from the need to comply with the requirements of 47 U.S.C. § 251(c), MTA's rural exemption no longer applies against GCI, whose cable affiliate provides service in the ILEC's service area. After being petitioned by GCI in an earlier docket, we reached a decision to terminate this exemption when an MTA affiliate entered into the video programming market.

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[18]Order U-05-46(5)/U-05-76(2), *Order Granting Petition for Suspension and Modification of Certain Arbitration Obligations,* dated September 21, 2005. The current suspension is in effect while we consider the merits of MTA's three-year suspension request. In accordance with our interim suspension order, MTA and GCI are currently arbitrating a wholesale rate for MTA's resold services.

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MTA requested suspension of certain interconnection duties under 47 U.S.C. § 251(f)(2) of the Act which allows small LECs to petition the state commission for suspension of or modification to the obligations of 47 U.S.C. § 251(b) and (c).

II. Scope of MTA's Suspension Request

MTA's petition requests suspension of "MTA's obligation to provide the interconnection services described under 47 U.S.C. § 251(c)(1)-(6) except for resale at wholesale (47 U.S.C. § 251(c)(4)) and the related duty to negotiate in good faith (47 U.S.C. § 251(c)(1))".[19] Our order addressing the request for interim suspension echoed MTA's language, granting interim suspension of MTA's "obligations to arbitrate an interconnection agreement, including the services described in 47 U.S.C. § 251(c)(1)-(6), but excluding resale at wholesale and the related obligation to negotiate in good faith . . . ."[20]

At hearing GCI argued that MTA did not provide any evidence of harm with regard to several 47 U.S.C. § 251(c) obligations, and moved to dismiss MTA's request to suspend the obligations stated at 47 U.S.C. § 251(c)(1) (good faith

[19] *MTA Petition for Suspension and Modification of Certain Section 251(c) Obligations Pursuant to Section 251(f)(2) of the Telecommunications Act of 1996* ("MTA Suspension Petition"), filed May 27, 2005, at 2. MTA clarified its request by stating that "MTA requests that the Commission suspend negotiations and any request for arbitration between MTA and GCI related to 47 U.S.C. § 251(c)(2), (3), (5), and (6)." MTA Suspension Petition at 13.

[20] Order U-05-46(5)/U-05-76(2), *Order Granting Petition for Suspension and Modification of Certain Arbitration Obligations,* dated September 21, 2005, at 22 (footnotes omitted).

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negotiations), (2) (interconnection), (5) (notice of changes), and (6) (collocation).[21] MTA filed a motion for clarification after the hearing, stating that it seeks suspension of its duty to provide 47 U.S.C. § 251(c)(3) UNEs and the other requirements of 47 U.S.C. § 251(c) as they apply to UNEs.[22]

We grant MTA's motion for clarification of its suspension request. Given MTA's clarification of its suspension request, we find that GCI's motion to dismiss is moot. Consistent with MTA's motion for clarification, we focus our determination on whether it is appropriate to suspend MTA's duty to provide UNEs (47 U.S.C. § 251 (c)(3)) and the application of 47 U.S.C. § 251(c)(1), (2), (5), and (6) to UNEs.

III. Required Showing

MTA requests relief under 47 U.S.C § 251(f)(2), which allows a state commission to suspend or modify a rural telephone company's obligations under

[21]Tr. at 159, lines 14-18; tr. 169, line 14 to tr. 170, line 7; *see also* Prefiled Responsive Testimony of Emily Thatcher at 1, 5. MTA responded that its suspension request is limited to relief from the duty to provide UNEs and other 47 U.S.C. § 251 (c) duties as they apply to UNEs. Tr. at 170, lines 8-18. MTA stated that the parties successfully negotiated 47 U.S.C. § 251(c)(2) interconnection and collocation services. Tr. at 172, lines 12-19.

[22]*MTA Motion for Clarification of its Petition for Suspension and Modification of Certain Section 251(c) Obligations*, on October 27, 2005, at 1. GCI filed a response on November 7, 2005, indicating that its motion to dismiss MTA's request for relief from 47 U.S.C. § 251(c)(1), (2), (5) and (6) was still pending and should be addressed in the final decision on this matter. *See GCI's Response to MTA's Petition for Clarification.*

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47 U.S.C. § 251(b) or (c) of the Act.[23] MTA contends that suspension of the duty to provide UNEs is necessary to avoid imposing a requirement that is unduly economically burdensome, and is consistent with the public interest, convenience, and necessity.

While the Act sets forth a two-part test for suspension, it does not establish the precise standard of review we must apply to MTA's 47 U.S.C. § 251 (f)(2) petition. However, since MTA advocates suspension of 47 U.S.C. § 251(c) obligations, we believe that MTA bears the burden of proving the appropriateness of that suspension. In other words, MTA must demonstrate that it is more likely than not under the preponderance of evidence standard that (1) it will suffer an undue economic burden under UNE competition and (2) suspension of the obligation to provide UNEs is consistent with the public interest, convenience and necessity.

IV. Suspension Inquiry

Before evaluating the evidence in this proceeding, we address GCI's contention that MTA is precluded from seeking suspension or modification. GCI contends that MTA forfeited its right to pursue 47 U.S.C. § 251(f)(2) suspension once it entered the video programming market. GCI views 47 U.S.C. § 251(f)(1)(C) as

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[23]More specifically, 47 U.S.C. § 251(f)(2), provides in pertinent part:

> A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines ... may petition the state commission for a suspension or modification of the application of a requirement or requirements of [Section 251(b) or (c)] to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification -
>
> (A) is necessary –
>
> (i) to avoid a significant adverse economic impact on users of telecommunications services generally;
> (ii) to avoid imposing a requirement that is unduly economically burdensome; or
> (iii) to avoid imposing a requirement that is technically infeasible; and
> (B) is consistent with the public interest, convenience, and necessity.

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evidence of an intended quid pro quo whereby a rural telephone company's decision to enter the video programming market triggers the forfeiture of its rural exemption rights as against the local cable operator. Under GCI's interpretation, a rural carrier cannot pursue suspension or modification under 47 U.S.C. § 251(f)(2) once it enters the video market and invokes the application of 47 U.S.C. § 251(f)(1)(C).[24]

We find no evidence that Congress intended that a rural carrier be precluded from obtaining 47 U.S.C. § 251(f)(2) suspension once it enters the video market. Such an interpretation would appear to override the express terms of 47 U.S.C. § 251(f)(2). That subsection allows a rural telephone company to petition the state commission for a suspension or modification of the application of requirements of 47 U.S.C. § 251(b) or (c), and does not include any statement indicating a rural telephone company that has entered into the video programming market may not petition for suspension.

Undue Economic Burden

We next determine whether MTA has demonstrated that it will suffer an undue economic burden under UNE competition. To support its allegation of potential undue economic burden, MTA referenced the amount of per-line revenues that would be lost under UNE competition and filed a Long Range Forecast (LRF) model that estimates the financial impact of UNE competition. GCI contends that UNE competition will not impose an undue economic burden on MTA and disputes the assumptions and results of the LRF model.

Before discussing MTA's evidence on undue economic burden, we address GCI's contention that 47 U.S.C. § 251(f)(1)(C) creates a "conclusive

[24]Prefiled Responsive Testimony of John Nakahata (Nakahata Responsive Testimony) at 20-21; *see also* Prefiled Responsive Testimony of Dana Tindall (Tindall Responsive Testimony) at 28-29.

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presumption" that the incumbent LEC suffers no undue economic burden vis-à-vis the local cable operator if the incumbent LEC has entered the video programming market. GCI notes that the rural exemption provisions require a state commission to terminate a rural exemption when it determines an interconnection request is not, *inter alia*, "unduly economically burdensome". GCI maintains that since 47 U.S.C. § 251(f)(1)(C) effectively eliminates the rural exemption as against the local cable company, 47 U.S.C. § 251(f)(1)(C) represents a determination by Congress that there is no undue economic burden when a rural telephone company enters the video market.[25]

We disagree with GCI's interpretation of the interplay between the 47 U.S.C. § 251(f)(1)(C) limitation on the rural exemption and the "undue economic burden" prong of 47 U.S.C. § 251(f)(2). Rather than stating that 47 U.S.C. § 251(f)(1)(C) represents a determination by Congress that there can be no undue economic burden when a rural telephone company decides to enter the video market, 47 U.S.C. § 251(f)(2) provides that a state commission "shall" grant a suspension request where the failure to do so will result in an undue economic burden. If Congress had intended to preclude a rural telephone company that has triggered 47 U.S.C. § 251(f)(1)(C) from seeking suspension, it would have stated that 47 U.S.C. § 252(f)(2) did not apply to a rural telephone company that has triggered the application of 47 U.S.C. § 251(f)(1)(C) by commencing video programming services.

Loss of Per Line Revenue as Evidence of Undue Economic Burden

MTA indicates that it currently averages $93 in revenue per-line, and will lose $78 in revenue (offset by the UNE rate) for each UNE line leased by GCI under

[25]Nakahata Responsive Testimony at 20-21.

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UNE competition.[26] MTA contends that the amount of lost revenue per-line under UNE competition is evidence of the undue economic burden resulting from allowing GCI access to UNEs. While MTA's loss of per-line revenue under UNE competition is an economic burden, we cannot assess the degree of this burden (i.e. whether the burden is undue) without additional evidence on the cumulative effect of this revenue loss. We look to MTA's LRF model for evidence regarding the degree of economic burden on MTA under UNE competition.

MTA's LRF Model as Evidence of Undue Economic Burden

MTA's LRF model attempts to quantify the anticipated economic burden that would result from GCI's competitive entry into MTA's service area. MTA's LRF model presents four competitive scenarios – facilities-based competition, wholesale resale competition, UNE-based competition with a UNE rate of $78, and UNE-based competition with a UNE rate of $38. MTA contends that the LRF model establishes that while facilities-based and/or wholesale resale competition may be sustainable, UNE-based competition will result in MTA incurring negative operating margins and being unable to access capital, leading to MTA's financial demise.

1. LRF Assumptions

[26]The amount of per-line revenue affected by UNE competition includes, among other things, end-user revenues and USF. Prefiled Testimony of Michael C. Burke (Burke Testimony) at 62 and Exhibit MCB-20 (calculation of MTA's regulated revenue per-line that is affected by UNE competition).

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GCI argues that the usefulness of a forecast model depends primarily on the assumptions driving the model.[27] We agree and will examine the assumptions built into the LRF model - as well as the LRF model run results - to assess MTA's contentions regarding the impact of UNE-based competition.

a. Form of Competition

MTA's LRF model assumes that GCI will utilize UNEs for competitive entry and continue to provide service solely through the use of UNEs over the five-year forecast period. MTA further estimates that 75 percent of the market share loss will be attributable to UNE loop (UNE-L) competition and 25 percent will be attributable to UNE platform (UNE-P) elements.[28] MTA contended that these assumptions are reasonable given that UNEs provide GCI with the "biggest bang for the buck",[29] and during interconnection negotiations GCI indicated that resale at a wholesale discount is not a desired means of competing in MTA's service area.[30] MTA explains that the LRF model does not reflect GCI migrating away from UNEs to its own facilities because the net margins associated with UNEs create a disincentive for GCI to deploy its own facilities.[31]

GCI questions the LRF model assumption that GCI will acquire all its telephony subscribers by leasing loops, contending that its does not make economic

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[27]Prefiled Rebuttal Testimony of Gregory F. Chapados (Chapados Rebuttal Testimony) at 19.

[28]Burke Testimony at 18-19.

[29]*Id.* at 25.

[30]*Id.* GCI's testimony also indicates that GCI avoids resale as much as possible because it fails to "provide GCI with a sufficient margin to compete." Tindall Responsive Testimony at 18.

[31]Burke Testimony at 31-34.

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sense for GCI to lease UNEs if GCI's cable plant passes the customer's premises.[32] Based on the percentage of households that are passed by GCI's cable plant, GCI estimates that 60 percent of its telecommunications customers will be served through GCI facilities while the remaining 40 percent will be served through UNEs.[33]

MTA disputed GCI's intent to provide service through a mix of UNEs and its own facilities, citing the expense of deploying GCI's cable telephony and the related risk to GCI of being unable to recover the capital investment.[34] MTA believes that GCI's margins resulting from leasing UNEs provides an incentive for GCI to use UNEs rather than deploy its own facilities.[35]

We find the assumption that GCI will utilize UNEs to the full extent allowed over the suspension period to be reasonable based on several factors. First, GCI will be unable to provide facilities based service until some time after its competitive entry into MTA's service area, and may not be able to provide facilities-based service for a

[32]Prefiled Responsive Testimony of Charles W. King (King Responsive Testimony) at 10. On reply MTA argued that if GCI were correct and economics favored service over GCI's facilities, GCI would withdraw its request for UNEs. Prefiled Reply Testimony of Michael C. Burke (Burke Reply Testimony) at 16-17.

[33]King Responsive Testimony at 12. King modified the LRF model to reflect MTA's revenues should GCI serve 60 percent of its customers through its own facilities and 40 percent of the customer through leasing UNEs from MTA. Exhibit CWK-8. MTA asserted that there was an error in King's LRF model calculations using the 60/40 facilities/UNEs split. Burke Reply Testimony at 21-23.

[34]Burke Reply Testimony at 16-21.

[35]Burke Reply Testimony at 20-21.

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considerable period of time after competitive entry.[36] Second, we agree with MTA that the net margins and decreased risks associated with UNEs could create a disincentive for GCI to deploy its own facilities, resulting in a slow migration from UNEs to GCI's cable facilities.[37]

b. Market Share Loss

MTA's LRF model estimates that GCI will garner 15 percent of the MTA local exchange market in the first year of competition, 26 percent in the second year, 34 percent in the third year, and 38 percent in the fourth year.[38] MTA based its market share loss projections on GCI's competitive entry in Anchorage, Fairbanks, and Juneau.[39] MTA contends that these market share loss estimates are buttressed by GCI's name recognition and market presence both statewide and in MTA's service area

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[36]GCI testified that "many unpredictable factors (such as competing capital demand within the company, technical and operational factors relating to the upgrade of the cable television network and roll out of service) that may impede GCI's ability to rapidly deploy cable telephony in Eagle River, Chugiak, and the Matsu (sic) Valley." Tindall Responsive Testimony at 13. At hearing GCI indicated that upgrades were necessary before its cable platform would be able to carry voice traffic in the MTA service area. GCI further stated that these cable platform upgrades were currently in the 2007 time frame, but the fact that the upgrades are on the 2007 capital plan does not necessarily mean the upgrades will occur at that time; it merely means that it is on the list of potential GCI projects and is competing with other capital demands. Tr. at 1042-1047.

[37]Burke Testimony at 31-34; Prefiled Reply Testimony of Michael J. Balhoff (Balhoff Reply Testimony) at 16-19.

[38]Burke Testimony at 20.

[39]MTA indicated that GCI has approximately 52 percent of the local exchange market in Anchorage, 28 percent in Fairbanks, and 32 percent in Juneau. MTA concluded that a reasonable market share loss estimate would be the average of the market share loss that occurred under UNE competition in those three markets, or 40 percent. MTA uses 38 percent as the amount of market share loss since that amount reflects the 40 percent market share loss measure times the 95 percent of MTA's access lines within MTA Visions service area. Burke Testimony at 21-22; Prefiled Direct Testimony of Carolyn Hanson (Hanson Testimony) at 15-16.

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(where GCI affiliates provide cellular, cable, Internet, and long distance service).[40] To further support its market share loss estimates, MTA submitted a survey indicating that a majority of MTA customers will switch carriers to save on phone rates.[41]

GCI disputes MTA's market share loss estimates, questioning MTA's decision to partially base market share loss estimates on experience in the Anchorage market. GCI contends its penetration rates in Anchorage were increased by a 25 percent rate increase by the incumbent, and notes that in the Fairbanks market GCI has not reached a 30 percent market share after four years of competition.[42] GCI concludes that MTA failed to satisfy its burden of proof regarding the reasonableness of the LRF model's market share loss assumptions.[43]

We find MTA's market share loss estimates to be reasonable given GCI's ability to bundle several services and its preexisting market presence in the MTA service area.[44] GCI is the largest interexchange carrier and cable provider in the state, and currently provides those services (as well as Internet service) in MTA's service area.[45] GCI also has statewide market presence and name recognition, and can be expected to benefit from this statewide market presence and name recognition when

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[40]Hanson Testimony at 16.

[41]Hanson Testimony at 20 and Exhibit CKH-16.

[42]Chapados Rebuttal Testimony at 12-15.

[43]*Id.*

[44]MTA argues that market share loss estimates may be too low given GCI's existing telecommunications (long distance) market share and market presence in MTA's service area. Burke Testimony at 22-23.

[45]MTA indicates that nearly 10,000 of MTA's local exchange service customers subscribe to GCI cable services, while 24,000 of MTA's local exchange service customers subscribe to GCI's long distance service. *Id.*

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bundling services.[46] Our conclusion is buttressed by the recent statements of GCI's Chief Executive Officer, who estimates that GCI's local phone service market penetration rates may approach 50 percent in the MTA service area.[47] GCI's own market analysis suggest that it has wide name recognition in MTA's service area and that 74 percent of respondents were very likely or somewhat likely to switch to a telephone company offering lower rates at the same quality and clarity as their current service.[48]

We also note that MTA's market share loss estimates are based on a presumption that MTA will need to decrease basic local rates by 25 percent to remain competitive.[49] We believe that MTA's market share loss estimates would likely be greater if the LRF model did not include the rate reduction.

c. Revenue Assumptions

MTA's LRF model projects the sources of revenues available to the company under the various competitive scenarios, including (1) federal high cost support, (2) UNE lease revenues, (3) local service revenues, and (4) access charge revenues. MTA's assumptions regarding the impact of UNE competition on these revenue sources are detailed below.

(i) High cost support

MTA argues that the loss of high cost support is far greater under UNE competition than under other forms of competition due to the portability of universal

[46]MTA contends that GCI's statewide presence will provide an advantage in serving business customers since GCI can sell itself as a "one stop shop" for statewide telecommunications needs. Hanson Testimony at 18.

[47]Hanson Testimony at 3-4 and Exhibit CKH-13.

[48]*See* Tindall Responsive Testimony Exhibit DT-1 at 4.

[49]GCI disputes whether MTA will lower basic local rates upon competitive entry.

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service fund (USF) support.[50] MTA's LRF model includes an assumption that federal USF is transferable and will "port" to a competitor for every access line that the competitor serves through the use of UNEs. GCI points out that USF is not ported to CLECs under Federal Communications Commission (FCC) and Universal Service Administrative Company's (USAC) current practice. GCI contends the LRF model makes an unrealistic assumption that there will be a change in this practice.[51] MTA notes that while USF does not currently port to CLECs, federal rules require porting and MTA assumes the portability rules will be enforced as written.[52]

MTA's assumption of portable support is based on 47 C.F.R. 54.307(a), which provides that the CLEC receives universal service support to the extent that the CLEC captures the subscriber lines of an ILEC or serves new subscriber lines in the

[50]The portability of USF is one reason CLECs might prefer to lease UNEs from the ILEC rather than resell the ILEC's services. Presuming the CLEC is an Eligible Telecommunications Carrier (ETC), the federal regulations state that the CLEC receives USF (up to the amount of the UNE rate) for every line served through UNEs, allowing the CLEC to offset or recover the UNE lease rate that it pays to the ILEC. However, when the CLEC provides service to a customer under a resale arrangement, the ILEC retains the USF support for that access line. In addition, MTA asserts that the ILEC's loss of USF is less under facilities-based competition. While the support is ported to the CLEC for each line its serves by its own facilities, the ILEC is able to "rebase" its support by spreading its network cost over the remaining lines, resulting in an increase of per line USF. Burke Testimony at 39-40, 42-43.

[51]Nakahata Responsive Testimony at 29-30, 33-34.

[52]Burke Testimony at 36-39. *See also* Prefiled Reply Testimony of Robert C. Rowe (Rowe Reply Testimony) at 24-25. The federal universal service fund is administered by the USAC. MTA provided correspondence with USAC indicating that 47 C.F.R. 54.307 will be enforced in the future and USF will port to the CLEC (Exhibit MCB-9) and a new FCC reporting form that requires CLECs to report number of lines captured through UNEs (Exhibit MCB-10).

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ILEC's service area.[53] We agree with MTA that it is reasonable to assume the federal rules on the portability of high cost support will be enforced as written in the future.

GCI also contends that MTA could seek a waiver or stay of the porting requirement stated at 47 CFR 54.307(a)(2).[54] We note that MTA's ability to obtain a waiver of the federal rules governing high cost support is uncertain, and any waiver might not be implemented until after MTA's five-year forecast period commences.[55] Accordingly, we believe it is reasonable for MTA's LRF model to exclude the possibility of a waiver of LRF porting rules and assume that the per-line USF would port to GCI for every line served through the use of UNEs.

GCI also argues that the loss of high cost support should not be considered in assessing undue economic burden since such loss of support is "an intended consequence of the Act", citing *Wireless World, LLC. v. Virgin Islands Public Service Commission* ("*Western Wireless*"), 2005 U.S. Dist. LEXIS 15061 (D. Virgin Islands, July 15, 2005).[56] This contention is not supported by the court's finding in the *Western Wireless* case and conflicts with an Eighth Circuit decision that overturned the FCC's definition of "undue economic burden".[57] In both *Western Wireless* and *Iowa II*,

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[53]Under federal regulations, the CLEC would receive per-line USF up to the amount of the per-line UNE rate. If the per line USF support exceeds the per-line UNE rate, the ILEC receives excess per-line USF support. 47 C.F.R. 54.307(a)(2).

[54]Nakahata Responsive Testimony at 34-39.

[55]We cannot ignore the possibility that the waiver request may be denied, especially when one considers the FCC's historical policy favoring fund portability and the fact that CLECs that would benefit from enforcement of the rule would likely contest MTA's waiver request. While MTA concedes that it could seek a waiver of some aspects of the federal rules on high cost support, it notes that there would be no guarantee that MTA would receive the waiver and the waiver process would take time. Burke Reply Testimony at 57-58.

[56]Nakata Responsive Testimony at 18 and Exhibit JTN-1.

[57]*See Iowa Utilities Board v. FCC (Iowa II)*, 219 F. 3d 744 (8th Cir. 2001)).

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the reviewing court indicated that the appropriate focus is the full economic burden on the ILEC, and no part of that burden should be disregarded.[58]

Finally, GCI indicates that even if USF is ported to a CLEC for its UNE lines, the amount of USF loss could be affected by the extent and degree to which UNE loop rates are averaged or deaveraged.[59] GCI indicates that MTA would receive the residual USF for a line served by GCI through UNEs where the per-line USF exceeds the per line UNE rate. While MTA agrees with GCI in theory, MTA assumes that the UNE rate would be deaveraged using a methodology similar to the way USF is disaggregated.[60] We have not as of yet been confronted with a request to establish

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[58]The *Iowa II* court stated that "[i]t is the full economic burden on the ILEC of meeting the request that must be assessed by the state commission." *Iowa II*, 219 F. 3d 744, 761. *Western Wireless* involved a district court's review of the Virgin Island PUC's decision to terminate a rural exemption based on a Hearing Examiner's finding that the cost to the ILEC of competitive entry was not great enough to be unduly economically burdensome. The *Western Wireless* court noted that the Hearing Examiner followed the *Iowa II* precedent, stating:

> Consistent with [*Iowa II*], the Hearing Examiner stated that "federal rules and regulations dictate that all costs incurred by the ILEC must be taken into consideration when determining whether Section 251(c) interconnection is burdensome." . . . . Nonetheless, the Hearing Examiner concluded that these economic costs were not unduly economically burdensome since "such events are an intended consequence of the Act . . . and also because [the ILEC] could take steps to mitigate the severity of the negative economic impact. . . . . this language suggests that the hearing officer considered the costs of competitive entry as part of his analysis but concluded that it was not unduly economically burdensome. . . . Moreover, as the Court understands it, the Hearing Examiner was also holding that [the ILEC's] costs associated with competitive entry were not great enough to be unduly economically burdensome.

Western Wireless at pp. 14-17 (citations and footnotes omitted).

[59]GCI notes that MTA has disaggregated USF in its service area, resulting in per-line USF support as high as $54.26 in high cost zones. GCI also notes that MTA's LRF model assumes an average UNE rate of $38 per line. In this situation, GCI notes that it would receive per-line USF up to the $38 UNE rate, while MTA would receive the remaining $16.26 in USF. Nakahata Testimony at 39-41.

[60]Burke Reply Testimony at 58-59.

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deaveraged UNE rates, and are not certain such a request would be forthcoming should MTA's suspension request be denied. Nonetheless, GCI did not present any evidence indicating the magnitude of any overall financial effect of deaveraged USF and averaged UNE rates, and thus we cannot conclude that the impact of deaveraged USF/averaged UNE rates on the LRF results are material to the point it should affect our conclusions regarding the LRF model.

(ii) UNE revenues

The LRF model treats UNE revenues as rent revenues to be deducted from regulated expenses before applying intrastate/interstate separations factors, and excludes revenues from other UNEs such as collocation and OSS.[61] With minor modifications, MTA used the Modified Synthesis Model (MSM) model and methodology employed in the Fairbanks arbitration between GCI and ACS to calculate UNE rates.[62] MTA indicated that model inputs were largely guided by our decision in Order U-96-89(42), with MTA developing each input with the most favorable value that MTA could reasonably defend.[63] The MSM model uses depreciation rates approved in MTA's recent depreciation proceeding.[64] Following this approach, MTA developed a UNE

[61]MTA notes that rates for collocation and OSS have not been developed and the resulting revenue contribution will be minimal. *Id.* at 35.

[62]*Id.* at 44-45.

[63]*Id.* at 45.

[64]MTA's depreciation study was reviewed in Docket U-04-1. Docket U-04-1 is titled *In the Matter of the Depreciation Study Filed by MATANUSKA TELEPHONE ASSOCIATION, INC. Id.* at 45-46.

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loop (UNE-L) rate of $38.18 and a UNE platform (UNE-P) rate of $47.94 – rates which MTA contends are the highest TELRC rates it can justify.[65]

GCI states that MTA's $38 LRF model run includes an assumption of 12,000 foot loops, and argues that shorter loop length of 6,000 feet would result in a UNE-L rate of $46.88, a monthly increase to the per loop UNE rate of over 23 percent.[66] However, GCI did not provide any evidence supporting its contention that MTA's network is built to 6,000 foot loop lengths throughout MTA's network. GCI states that "[i]f taken over all of MTA's loop plant, the cost difference between 12,000 foot loops and 6,000 foot loops would amount to approximately $6.7 million dollars annually."[67]

We find that MTA has presented sufficient evidence to support its proposed UNE rates. The rates are based on a methodology we recently employed in another arbitration proceeding. We do not agree with GCI concerning the appropriateness of reducing loop lengths to 6,000 feet throughout MTA's network, and thus do not find adequate evidence to support GCI's proposed $46.88 UNE rate. Moreover, MTA's LRF model run demonstrates that significant economic harm would result from UNE rates significantly higher than $38.[68]

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[65] *Id.* at 47-48, 63-64. UNE-L involves access to local loop that connects end-user to central office, and UNE-P involves a combination of MTA's local loop, local switching, and other functions to allow access to customers. The UNE-P rate is higher than the UNE-L rates since it includes a broader scope of functions. As noted previously, MTA estimates that 75 percent of the market share loss will be attributable to UNE-L competition and 25 percent will be attributable to UNE-P elements.

[66] King Responsive Testimony at 16-17.

[67] *Id.* at 1.

[68] MTA presented a LRF model run that reflected a $78 UNE rate, which reflects the amount of per-line revenue that MTA indicates it will lose under UNE competition. The results of that model run show that MTA would suffer significant economic impairment even at the $78 UNE rate. *Id.* at 62-63; *see also* MCB-21 (LRF model scenario using a $78 UNE rate).

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(iii) Local revenues

The LRF model attempts to specifically identify the local revenues MTA will lose under the various competitive scenarios.[69] One assumption included in the LRF model run is that competitive entry will force MTA to reduce basic local service rates by approximately 25 percent.[70] GCI stated that the LRF model's reductions to local service rates was based on a mistaken tariff filing,[71] and submitted an exhibit that reversed this and other assumptions from the LRF model.[72] On reply, MTA cited several factors to support the LRF model's 25 percent composite local line rate reduction.[73]

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[69]For example, MTA assumes that the loss of an access line through UNE competition line will result of loss of revenues from local service and custom calling features, but not directory revenues. *Id.* at 48-49.

[70]Burke Testimony, Exhibit MCB-2 (LCLVAL spreadsheet). MTA's $38 LRF model indicates that the composite local rate will decrease from upon competitive entry.

[71]To support its rate decrease assumption, MTA cited GCI's proposed tariff in Docket U-05-4, which proposes local rates substantially less than MTA's for both residential (30 percent lower) and business (18 percent lower) service. Burke Testimony at 50; Hanson Testimony at 8-9. Docket U-05-4 is titled *In the Matter of the Application by GCI COMMUNICATION CORP. d/b/a GENERAL COMMUNICATION, INC. and GCI for an Amendment to its Certificate of Public Convenience and Necessity to Operate as a Competitive Local Exchange Telecommunications Carrier.*

GCI testified that it had mistakenly submitted the tariff for Juneau with its application to serve in MTA's service area, and had resubmitted proposed rates for MTA's service area that were more closely aligned with MTA's. Prefiled Responsive Testimony of Frederick W. Hitz (Hitz Responsive Testimony) at 3-4 and Exhibit FWH-1. GCI's revised basic residential rate ($12.80) is approximately three percent lower than MTA's basic residential rate ($13.20), and GCI's revised single business line rate ($20.22) is approximately three percent lower than MTA's basic business single party rate is ($20.85).

[72]King Responsive Testimony at 9, 11 and Exhibit CWK-8.

[73]Burke Reply Testimony at 13-16 and Exhibit MCB-24; Hanson Reply Testimony at 6-8 and Exhibit CKH-18.

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We believe that MTA's has adequately supported the LRF model's assumed composite 25 percent reduction to basic local service rates. Several factors indicate that the rate decrease assumption is reasonable. First, GCI stated that it intends to exert downward pricing pressures on rates in MTA's service area.[74] Second, GCI's bundled offerings result in a significant discount off local service rates.[75] Third, we anticipate that GCI will continue its practice in competitive local exchange markets of offering businesses (and perhaps residential customers) term discounts that effectively discount the local service rate, and of providing incentives for residential customers to switch to GCI.[76] Finally, we note that the composite 25 percent basic line rate reduction

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[74]GCI indicates that "because GCI's UNE price is not based on the incumbent's retail price structure, GCI can exert real price discipline on the incumbent and offer consumers lower priced services via UNEs." Tindall Responsive Testimony at 20.

[75]MTA presented an exhibit indicating the GCI's bundling practices result in an effective 25 to 30 percent discount off of local service rates. Hanson Reply Testimony at 6-8 and Exhibit CKH-18. MTA also cited GCI's comments in another docket indicating that GCI offered prices 40 percent lower than the incumbent's through bundled offerings when GCI entered Anchorage market. Burke Reply Testimony at 14 and Exhibit MCB-24, citing *Prefiled Direct Testimony of Dana Tindall,* filed February 26, 2004, in Dockets U-97-82/U-97-143/U-97-144.

Docket U-97-82 is *In the Matter of the Petition by GCI COMMUNICATION CORP. d/b/a GENERAL COMMUNICATION, INC. and d/b/a GCI for Termination of the Rural Exemption and Arbitration With PTI COMMUNICATIONS OF ALASKA, INC., under 47 U.S.C. §§251 and 252 for the Purpose of Instituting Local Exchange Competition.*

Docket U-97-143 is *In the Matter of the Petition by GCI COMMUNICATION CORP. d/b/a GENERAL COMMUNICATION, INC. and d/b/a GCI for Termination of the Rural Exemption and Arbitration With TELEPHONE UTILITIES OF ALASKA, INC., under 47 U.S.C. §§251 and 252 for the Purpose of Instituting Local Exchange Competition.*

Docket U-97-144 is titled *In the Matter of the Petition by GCI COMMUNICATION CORP. d/b/a GENERAL COMMUNICATION, INC. and d/b/a GCI for Termination of the Rural Exemption and Arbitration With TELEPHONE UTILITIES OF THE NORTHLAND, INC., under 47 U.S.C. §§251 and 252 for the Purpose of Instituting Local Exchange Competition.*

[76]Burke Reply Testimony at 14.

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Exhibit A

amounts to a 12 percent reduction to overall local revenues in the LRF model,[77] a level that is reasonable given the likelihood of reductions to MTA directory and vertical service revenues[78] and the possible disproportionate loss of per-line revenue should MTA lose larger business customers to GCI under UNE competition.[79]

(iv) Access charge revenue

The LRF model includes access charge reductions in proportion to the projected number of access lines lost to GCI through UNE competition. GCI argues that the LRF model fails to recognize that MTA's intrastate access revenues per line can be increased as the number of access lines decrease.[80] MTA disputes that it will obtain a per line increase in intrastate access revenues in a competitive climate, arguing that any proposal by MTA to raise access rates will be opposed by AT&T Alascom and will provide an incentive for carriers to bypass MTA's access tariff. MTA also points to the fact that when MTA loses an access line to GCI, it will lose the intrastate access demand for that line and the Network Access Fee (NAF) associated with that access line.[81]

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[77] *Id.* at 15-16.

[78] Vertical services are options that the customer can add to his/her basic service, such as custom calling features. *See Newton's Telecom Dictionary*, p. 801. Should MTA lose an access line to GCI, it will also lose the vertical service revenues (e.g., revenues from custom calling features such as Caller ID) associated with that access line. Burke Reply Testimony at 15.

[79] MTA noted that the LRF model does not reflect that the loss of MTA's largest business customers would have a disproportional negative impact on local revenues; instead the LRF model assumes the same revenue loss per line. MTA estimates the loss of losing top 25 business customers at 2.8 million. Hanson Testimony at 18-19 and Exhibit CKH-15.

[80] King provided an estimate of year-by-year increases to intrastate access charge revenue. King Responsive Testimony at 23-27 and Exhibit CWK-6.

[81] Burke Reply Testimony at 35-39.

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GCI also contends that the LRF model includes an error in the calculation of interstate access charges, resulting in a $5.76 per month overstatement of revenue loss per UNE-line revenue.[82] GCI believed that the alleged error was likely due to MTA double counting some, if not all, of the revenue loss associated with the ICLS program.[83] In response, MTA contends that it was unable to reproduce GCI's calculation and that GCI had overlooked that when a UNE line is sold to GCI, part of the interstate revenue requirement will be offset by the additional UNE revenue, causing a decline in the interstate access revenue requirement on top of the loss the subscriber line charge.[84] MTA asserts that correcting for this omission accounts for the $5.76 difference and there is no error in the LRF model. [85] We conclude GCI has not sufficiently demonstrated that there is an error in the MTA calculation of interstate access revenues.

We find it reasonable to assume that MTA's access charge reductions will be relatively proportional to the projected number of access lines lost during the LRF forecast period. The majority of MTA's intrastate access revenue is currently derived through the Carrier Common Line (CCL) rate element and NAF, which together represent the cost of the intrastate access portion of its local loop.[86] Under competition,

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[82]King Responsive Testimony at 25.

[83]King discusses the three categories of interstate access revenues: switched common line, switched traffic sensitive and special access. *Id.* at 27.

[84]Burke Testimony of Burke at 39-40.

[85]*Id.* at 41.

[86]Non-pooling company switched intrastate access charges may include a Common Carrier Line (CCL) rate component (Alaska Intrastate Interexchange Access Charge Manual (Manual) Section 104), a per minute local switching charge (Manual Section 106(a), (c)), Common and Dedicated Transport rate elements (Manual Sections 111 and 112), and a monthly per line equal access charge (Manual Section 107(c)). In addition, a monthly Network Access Fee (NAF) is assessed against each end user (Manual Section 109).

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MTA's CCL rate per line will be capped at a specific level based on its past access charge revenue requirement.[87] For each line that MTA loses under UNE competition, MTA will lose the CCL revenue and the NAF, as well as revenue from other rate elements (i.e., switching and transport).

An assumption that MTA will be able to raise its access charge rates to recover lost access charge revenues is speculative. Even assuming MTA were able to obtain an increase to its per-line access charge rates beyond the caps, there could be a substantial delay in obtaining this relief.[88] An access charge rate case would be required, and that proceeding could be protracted if the rate increase is contested as MTA suggests.[89] We do not agree with GCI contention that MTA will be able to fully and timely offset any lost access revenues. We therefore find MTA's assumptions regarding the loss of access charge revenue to be reasonable.

(v) Subsidiary revenues

Two highly contested issues in this proceeding were whether the revenues of MTA's subsidiaries should be included in the assessment of undue economic burden, and if so, whether those revenues will offset or exacerbate the economic loss MTA encounters under UNE competition. Our discussion in this section deals with the issue of whether subsidiary revenues should be considered in an assessment of undue economic burden; the availability of subsidiary revenues to offset MTA's lost revenues will be discussed in the section addressing the LRF model results.

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[87]For nonpooling companies, the intrastate CCL charge is capped based on the incumbent LEC's last approved access charge revenue requirement.

[88]We note that GCI's intrastate access charge increase includes a one-year lag in the access charge recalculation.

[89]We also note that GCI's adjustments do not reflect an administrative cost to MTA in association with an access charge revenue requirement proceeding.

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MTA excludes subsidiary operations from the LRF model and limits the model's analysis to the economic impact of UNE competition on MTA local exchange service operations.[90] GCI believes that revenues from subsidiary operations should be included in MTA's financial forecast, arguing that all revenues MTA generates from its customer base should be examined when assessing economic burden - especially where services are offered over common outside plant.[91] MTA believes that the proper focus is the impact of UNE competition on MTA's local exchange operations, and subsidiary activities are not relevant to a determination of the economic burden associated with UNE competition.[92]

While subsidiary revenues could be a factor when a state commission assesses undue economic burden under 47 U.S.C. § 251(f)(2), at this stage of the process the proper focus is the economic harm that the ILEC will suffer by complying with the 47 U.S.C. § 251(c) duty to provide UNEs. Once we assess the economic harm to MTA's LEC operations, we will determine whether subsidiary revenues provide a means of offsetting MTA-LEC's economic burden.

d. Expenditures

MTA's LRF model includes two major categories of expenditures – operating expenses and capital expenditures. One subcategory of capital expenses is the requirement that MTA retire capital credits on an annual basis, a requirement that GCI questions. Below is a discussion of MTA's assumptions regarding these expenditures.

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[90]Burke Testimony at 57.

[91]Nakahata Responsive Testimony at 8.

[92]Burke Reply Testimony at 28-30, 32-33; Mayo Reply Testimony at 7.

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(i) Operating expense

MTA's LRF model uses as a base line for operating expense data from MTA's 2005 operating budget. The LRF model incorporates an annual operating expense growth factor of 2.59 percent based on the average rate of inflation,[93] a growth factor which MTA characterizes as conservative given the rate of population growth in the Mat-Su.[94]

One aspect of projected operating expenses that GCI disputes is the projected increases in customer service operations expense. GCI believes the level of customer operations expense should drop as the number of retail customers drop, and cites ACS of Anchorage, Inc.'s (ACS-AN) 46 percent decrease to customer operations after competitive entry.[95] MTA asserts that GCI's analysis of ACS-AN's customer operations costs is flawed since the analysis includes a period in which ACS-AN lowered customer operation costs by consolidating the former Anchorage Telephone Utility and the former subsidiaries of Pacific Telecom, Inc. MTA states that during the post-consolidation period (2000-2004) ACS-AN's customer operations expenses remained relatively flat. MTA also noted that ACS-AN's customer service operations are far more automated than MTA's.[96]

We believe that MTA's projected operating expenses in the LRF model are reasonable. The Matanuska Valley is among the fastest growing areas of the state, and it is reasonable to expect continued growth in that area over the next five years. MTA's network has significant fixed costs that will not necessarily decline as MTA loses

[93]Burke Testimony at 51-52.

[94]MTA notes that the actual average growth rate in MTA operating expenses from 2002 through 2004 was 9.74 percent. Mayo Testimony at 13.

[95]King Responsive Testimony at 13-15 and Exhibit CWK-8.

[96]Burke Reply Testimony at 24-28 and Exhibit MCB-29.

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market share,[97] and MTA's network maintenance expenses will not decline under UNE competition (MTA is obligated to maintain the entire network, including lines leased to GCI).[98] MTA will presumably spend more on marketing and advertising in an attempt to retain or win back customers in a competitive climate.[99] MTA has little control over some operating costs, such as pension costs, health insurance costs, and union-related labor expenses.[100] We also find MTA's projected increases to customer service operations reasonable given the need to respond to GCI's competitive entry into the MTA service area.[101]

(ii) Capital Expenditures

MTA's plant investment baseline for the LRF model is the company's 2004 year end balances. Under MTA's LRF model, capital expenditures will peak at in 2005, and will steadily decline in 2009 and in 2010.[102] MTA states that it based its capital investment estimates on engineer planning forecasts of additions and retirements.[103] MTA contends its capital expenditure projections are reasonable, but may be conservative given the anticipated growth in the Matanuska Susitna Valley and MTA's Carrier of Last Resort (COLR) responsibilities and given that the model forecasts lower levels of capital investment than the company incurred in 2003 and 2004.[104] GCI argues

[97]Mayo Testimony at 17-18.

[98]Prefiled Direct Testimony of Richard M. Kenshalo at 25-27.

[99]Mayo Testimony at 14-15; Hanson Testimony at 12-13.

[100]Mayo Testimony at 13-14

[101]Hanson Reply Testimony at 10-14.

[102]*See* Burke Testimony, Exhibit MCB-2.

[103]Burke Testimony at 53.

[104]Burke Testimony at 54.

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that MTA' projected capital expenditures are excessive, noting that MTA's 2004 capital expenditures equal 33 percent of its 2004 total revenues.[105]

While the ratio of MTA's capital expenditure to its total revenues is well above the average ratio for an ILEC, GCI did not establish that MTA's 2004 capital expenditures were inappropriate. The fact that MTA's ratio of capital investment to revenues is higher than the national average does not necessarily mean that MTA's investment ratio is unreasonable; the circumstances MTA faces may justify this higher network investment ratio. We note that the Matanuska Susitna Valley is one of the fastest growing regions in the state, and believe the high rate of population growth in MTA's service area (when considered in conjunction with MTA's Carrier of Last Resort (COLR) responsibilities) justifies higher-than-average network investment. In addition, high capital investment levels are consistent with MTA's stated goal of bringing quality services, including advanced services, to its customers.[106] MTA's capital expenditures are understandably higher than the industry average as a result of the company's decision to upgrades its network to allow advanced services.

MTA's network upgrades have helped prepare the company for local exchange competition. Market characteristics and the record of this proceeding indicate that MTA's ability to compete evenly with GCI will largely depend on its ability to match the bundling ability of GCI, a company capable of bundling local and long distance voice (including wireless) service, Internet service (including broadband), and cable television. To match GCI's bundling ability, MTA upgraded its wireline facilities in many areas to

[105]GCI indicates the LEC industry standard for capital expenditures is 12-15 percent of the company's total revenues. Chapados Responsive Testimony at 25-26.

[106]Berberich Testimony at 9-10.

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provide broadband capability, allowing the provision of broadband Internet access and cable television service.[107]

(iii) Capital Credits

MTA's capital expenditures include an annual repayment/retirement of capital credits, an obligation that GCI characterizes as a "discretionary" cash flow requirement.[108] MTA contends that the issuance of capital credits is a mandatory obligation for a cooperative, and halting MTA capital credit payments would jeopardize MTA's favorable tax treatment as a cooperative.[109] We find that MTA adequately explained that capital credits are an obligation that must be fulfilled by MTA in order to avoid losing the favorable tax treatment MTA enjoys as a cooperative.

[107]GCI contends that by using USF to offset the cost of upgrades to its wireline network, MTA may be violating 47 U.S.C. § 254(e) and (k) of the Telecommunications Act. Nakahata Responsive Testimony at 26-29. 47 U.S.C. § 254(e) requires a carrier that receives USF to use that support only for "the provision, maintenance, and upgrading of facilities and services for which the support is intended", while 47 U.S.C. § 254(k) prohibits carriers from using services that are not competitive to fund services that are subject to competition. MTA states that LECs receiving high cost support may invest in their networks to provide a level of service higher than required to provide the "covered services" required before a carrier may receive high cost support (*see* 47 U.S.C. § 254(c) and 47 C.F.R. § 54.101 for a discussion of the covered services). Rowe Reply Testimony at 22. MTA also cites the Act's mandate that the FCC and state commissions encourage the deployment of advanced telecommunications services. *Id.* at 23, citing 47 U.S. C. § 157 notes.

MTA also states that any concerns regarding its use of federal support should be addressed in an appropriate proceeding. Rowe Reply Testimony at 21. We will not address GCI's allegations regarding the misuse of universal service in the absence of a complaint on that issue.

[108]King Responsive Testimony at 10, 27-28. GCI did not provide any support for its assertion that capital credits are discretionary rather than mandatory.

[109]Strait Reply Testimony at 9-20.

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Exhibit A

e. Retained Capital/Long-Term Debt:

MTA assumes its will need to maintain a minimum cash balance of $5 million (or one month's expenditures), an amount that it would like to grow to $15 million in a competitive climate. Based on its weighted debt at the end of 2004 (5.35 percent), MTA uses a 5.5 percent interest rate in the calculation of interest expense on new debt in the LRF model.[110]

MTA contends that the LRF model run indicates that the company will generate insufficient capital under UNE competition to satisfy its loan covenants, jeopardizing its ability to access capital. As a cooperative, MTA's primary source of capital (outside of operating cash flow and retained margins from members) is long-term debt.[111] MTA's primary lenders are the Rural Utilities Service (RUS), the National Bank for Cooperatives (CoBank), and the Rural Telephone Finance Cooperative. Aside from these lenders, there are few loan sources for MTA.[112] RUS loan covenants include a requirement that MTA meet a Debt Service Coverage (DSC) ratio of 1.25 and a Times Interest Earned Ratio (TIER) of 1.50, while CoBank requires MTA to maintain a Leverage Ratio under 3.5.[113]

We find MTA's argument concerning its limited sources of capital credible, and believe that MTA must continue to comply with applicable loan covenants to retain its ability to access capital in the future. We must now assess the validity of MTA's claims that it will be unable to satisfy debt covenants should we allow UNE-based competition in MTA's service area.

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[110]Mayo Testimony at 20.

[111]Mayo Testimony at 18-19; Burke Testimony at 55-56.

[112]Mayo Testimony at 19. MTA notes that the RUS loans are secured by MTA's assets, decreasing the likelihood that MTA could obtain financing from other lenders.

[113]Mayo at 20-21 and Exhibit RDM-5.

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2. LRF Model Results

MTA's LRF model portrays the economic burden that will result from competition under the various competitive scenarios, including a $38 UNE rate.[114] MTA's LRF $38 UNE model run indicates that MTA will incur negative operating and net margins during the first year of UNE competition, with cumulative negative net margins over the five year forecast period of approximately $61 million.[115] Under the $38 UNE scenario, MTA's DSC ratio will gradually decrease, falling below the RUS required ratio of 1.25 in the third year of UNE competition. MTA's TIER will fall below the required 1.50 level in the first year of the five-year forecast. MTA's Leverage Ratio will be above the required limit in the first year of UNE competition and will increase each year thereafter.[116] MTA will be unable to meet its loan covenants and with no clear repayment capability, MTA contends that lenders will cut off access to debt capital.[117] MTA's primary lenders have confirmed should the $38 UNE LRF model results prove true, these lenders will either refuse or restrict MTA's future access to loans.[118]

In assessing MTA's LRF results under the $38 UNE scenario, we note that MTA's access to capital markets is not possible since MTA is a cooperative;[119] the company's only significant access to capital is operating cash flow, retained margins

[114]MTA's inputs and assumption under the $38 UNE rate scenario are presented in Burke's direct testimony as Exhibit MCB-2. MTA's LRF model runs also indicate that MTA will suffer significant impairment if the UNE rate were to be as high as $78. See *also* Exhibit MCB-21.

[115]Burke Testimony at 58.

[116]*See* Exhibit MCB-2.

[117]Burke Testimony at 59.

[118]*See* Mayo Testimony, Exhibits RDM-8 and RDM-9.

[119]Mayo Testimony at 18.

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from members, and long-term debt.[120] Given that MTA will incur negative operating margins starting in the first year of competitive entry via UNEs and given limited access to future loans, it appears that MTA's ability to continue operations would be questionable. We note that MTA's debt covenants are based on the consolidated financial statements of MTA and its subsidiaries.[121] Where a loan is granted based on consolidated operations, we believe that affiliate revenues must be considered to determine whether the consolidated companies will be able to meet loan covenants and satisfy debt commitments.

GCI estimates that MTA's subsidiaries will generate significant revenues over the forecast period.[122] MTA disputes GCI's estimate, noting that (1) GCI mistakenly assumes that MTA Visions started at a break-even mode when it is currently losing money,[123] and (2) GCI fails to recognize that MTA's loss of a local exchange service customer through UNEs will also likely result in losing that customer's other business with MTA's subsidiaries, resulting in a loss of revenues associated with nonregulated services as well.[124] MTA submitted financial statements for each MTA affiliate that show that two of the four subsidiaries (the wireless and video programming affiliates) are incurring substantial losses, while the other two subsidiaries (the long distance and Internet service provider (ISP) affiliates) garnered modest profits last year.[125]

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[120]Mayo Testimony at 18-19; Burke Testimony at 55-56.

[121]*See* Mayo Testimony, Exhibit RDM-7 at 7.

[122]King Responsive Testimony at 15-23.

[123]Burke Reply Testimony at 30.

[124]Mayo Reply Testimony at 11; Balhoff Reply Testimony at 10.

[125]*See* H-32; H-33; H-35. The information contained in the financial statement for MTA Long Distance, Inc. is available through review of the annual report MTA Long Distance, Inc. filed with us on April 29, 2005.

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We find that MTA presents the more likely scenario with regard to MTA subsidiary revenue under UNE competition. Given the current negative overall operating margins of MTA's nonregulated subsidiaries and the uncertainty regarding the future profitability of these entities in a competitive market, we believe that the inclusion of MTA subsidiary revenues in the assessment of undue economic burden creates an even bleaker financial forecast for MTA.[126]

In summary, we find that MTA satisfied its burden of proving by a preponderance of the evidence that it will suffer economic harm under UNE competition. MTA's LRF model demonstrates that it will incur negative operating and net margins shortly after competitive entry via UNEs, leading to MTA's inability to satisfy financial ratios required by its lenders, with the eventual result being a loss of access to debt capital. Given their overall lack of current profitability, MTA's subsidiaries cannot be viewed as a source of replacement revenues in the near future. Having found the LRF model results in a credible projection of MTA's revenues under UNE competition, we must next determine whether the economic burden imposed on MTA by UNE competition should be considered "undue".

3. Conclusion: LRF Model and Undue Economic Burden

The Act does not define the phrase "undue economic burden." Both MTA and GCI presented definitions of the term. After the Telecommunications Act was enacted, the FCC defined "undue economic burden" as a requirement that a LEC demonstrate that the application of 47 U.S.C. § 251(b) or 47 U.S.C. § 251(c) of the Act would likely cause an undue economic burden beyond the economic burden typically associated with efficient competitive entry. In *Iowa II*, the Eighth Circuit Court of

[126]Burke Reply Testimony at 33-34; Mayo Reply Testimony at 16-17 and Exhibit RDM-13. MTA's forecast of MTA's nonregulated revenues over five years shows a cumulative net operating loss of $18.2 million.

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Appeals struck down the FCC's definition of undue economic burden, finding the FCC's exclusion of the economic burdens ordinarily associated with competitive entry conflicted with Congressional intent.[127] The Eighth Circuit stated that "[i]t is the full economic burden on the ILEC of meeting the request that must be assessed by the state commission."[128] The FCC has not adopted a new definition of "undue economic burden" since the *Iowa II* decision.

MTA and GCI each advocated two potential definitions of the term "undue economic burden" in this proceeding. We find three[129] of the four definitions of "undue economic burden" to be within the range of reasonable interpretations of that term, and further find that MTA has demonstrated that the economic burden on MTA from UNE competition qualifies as "undue" under each of those three definitions.

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[127] *See* Iowa Utilities Board v. FCC, 219, F. 3d 744 (8th Circ. 2001).

[128] *Id.*

[129] GCI witness John Nakahata promoted a "pain threshold"test that looks to the pain the ILEC can be expected to bear during the transition to competition, stating:

> If the economic burden exceeds the pain threshold that the Commission thinks is reasonable, then the burden would be "undue". . . . The Commission should consider a number of factors . . . [including] the resources available to the ILEC, including those available to its holding company, and the extent to which it operates other lines of business that complement its regulated businesses and potentially gives the ILEC the ability to devise bundles and other marketplace responses to competition. . . . .The Commission should also consider the extent to which it can mitigate, through means other than suspension or modification, the "pain" that an ILEC may bear through asymmetric regulations that become unnecessary in a competitive market-place or that can be achieved through symmetrical regulation. If it can mitigate that "pain", then it should do so though those means, rather than by suspension of the requested Section 251(b) or (c) requirements. . . .

See Nakahata Responsive Testimony at 22-24. We find little support for a "pain threshold" analysis, and note that this test does not specify the showing required to establish undue economic burden. As a result, this test is overly subjective and could lead to inconsistent findings on the issue of undue economic burden. Accordingly, we decline to use the "pain threshold" test to determine whether the economic burden on MTA from UNE competition is undue.

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MTA witness Michael Balhoff indicated that an undue economic burden exists where the economic burden associated with competitive entry creates instability, placing the enterprise at risk, or creates a reasonable expectation that the ILEC will be unable to compete equitably. [130] The $38 UNE rate LRF model scenario demonstrates that UNE competition will create instability and place the MTA at risk; MTA's negative operating margins under UNE competition will jeopardize MTA's ability to satisfy the financial ratios required by its lenders, creating the possibility that MTA will default on the loans and be unable to secure additional debt capital. MTA will also be placed at risk of being unable to compete equitably under UNE competition given its potential inability to access capital. GCI will presumably generate profits from each line it serves via UNEs,[131] and will be able to use those profits to fund the necessary upgrades to its cable plant. Despite negative operating margins, MTA will be required to maintain, upgrade, and extend facilities.[132] In short, we believe that the LRF model demonstrates that UNE competition will impose an undue economic burden on MTA under the Balhoff test.

MTA also referenced a definition of undue economic burden first promoted by GCI in a prior rural exemption proceeding before this Commission, where GCI witness Charles King indicated that the test of undue economic burden is whether the ILEC can generate sufficient cash from its operations to cover its cash expenses, meet its interest obligations, and make the capital expenditures necessary to maintain its

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[130]Prefiled Direct Testimony of Michael Balhoff (Balhoff Testimony) at 45.

[131]GCI will be able to generate local service revenues (including USF) without being required to maintain the facilities it leases.

[132]As the owner of the underlying network, MTA will be responsible for network maintenance. MTA is also the COLR, and will be responsible for extending service to unserved locations unless we mandate that GCI share COLR responsibilities.

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network in a condition to provide state-of-the-art services.[133] As discussed above, the LRF model demonstrates that under UNE competition MTA will be unable to generate sufficient cash to cover cash expenses (incurring negative free cash flow),[134] meet interest obligations (failing to satisfy loan covenants), and make the capital expenditures necessary to maintain its network in a condition to provide state-of-the-art services (lacking access to capital to fund network maintenance or upgrades). Accordingly, we find that the LRF model demonstrates that UNE competition will impose an undue economic burden on MTA under the King test.

Finally, GCI witness Gregory Chapados indicates that the undue economic burden standard is met upon proof that the totality of the likely circumstances in a competitive market (e.g., market share loss, inability to generate replacement revenues and cash flow, etc.) will jeopardize the ILEC's ability to muster the internal and external financial resources necessary to fund its daily operations and essential capital

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[133]Burke Reply Testimony, Exhibit MCB-39; *see also* Prefiled Direct Testimony of Charles W. King, in Dockets U-97-82/U-97-143/U-97-144 at 13.

Docket U-97-82 is titled *In the Matter of the Petition by GCI COMMUNICATION CORP. d/b/a GENERAL COMMUNICATION, INC., and d/b/a GCI for Termination of the Rural Exemption of and Arbitration with PTI COMMUNICATIONS OF ALASKA, INC., under 47 U.S.C. 251 and 252 for the Purpose of Instituting Local Exchange Competition.*

Docket U-97-143 is titled *In the Matter of the Petition by GCI COMMUNICATION CORP. d/b/a GENERAL COMMUNICATION, INC., and d/b/a GCI for Termination of the Rural Exemption of and Arbitration with TELEPHONE UTILITIES OF ALASKA, INC., under 47 U.S.C. 251 and 252 for the Purpose of Instituting Local Exchange Competition.*

Docket U-97-144 is titled *In the Matter of the Petition by GCI COMMUNICATION CORP. d/b/a GENERAL COMMUNICATION, INC., and d/b/a GCI for Termination of the Rural Exemption of and Arbitration with TELEPHONE UTILITIES OF THE NORTHLAND, INC., under 47 U.S.C.251 and 252 for the Purpose of Instituting Local Exchange Competition.*

[134]*See* Exhibit MCB-2 at 6.

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operations.[135] MTA's LRF model incorporating a $38 UNE rate demonstrates that the totality of likely circumstances MTA will face in a competitive market will jeopardize MTA's ability to muster the internal and external financial resources necessary to fund its daily operations and essential capital operations. MTA's LEC operations will operate at a substantial loss during the forecast period. Given their current negative operating margins and uncertain profitability in the near future, MTA's subsidiaries cannot be counted on to provide sufficient positive cash flow to overcome the LEC's losses. The loss of operating margins will negatively impact MTA's financial ratios, resulting in an inability to obtain additional debt capital, jeopardizing MTA's ability to fund daily operations and essential capital operations. In short, we find that the LRF model demonstrates that UNE competition will impose an undue economic burden on MTA under the Chepados test.

Consistent With the Public Interest, Necessity, and Convenience

We have determined that approval of the MTA request for suspension is necessary to avoid imposing an undue economic burden on MTA, meeting the first test for granting suspension (47 U.S.C. § 251(f)(2)(A)(ii)). Under the second test (47 U.S.C. § 251(f)(2)(B)), we must evaluate whether granting the MTA's suspension request is "consistent with the public interest, convenience, and necessity".

GCI contends that competition is in the public interest and will benefit consumers in the MTA area.[136] We believe that in Anchorage and other markets competition has been beneficial to consumers. We agree with GCI that one of the key public interest issues in this proceeding is the extent to which approving MTA's request will affect competition in the market.

[135]Chepados Rebuttal Testimony at 26-27.

[136]Tindall Responsive Testimony at 21-22.

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In this instance we do not see the debate as centering on whether GCI will compete. GCI has recently sought and obtained certification in MTA's service area and has indicated its intent to compete.[137] In its application for local service, GCI asserted that it would be able to provide service throughout MTA's service area without reliance on UNEs or a decision by this Commission as to whether a company has or should retain a rural exemption.[138] The record indicates that GCI would have a variety of options for providing service to its customers other than UNEs, should we approve MTA's request.[139] We believe GCI will serve in MTA's area regardless of whether we approve MTA's request. As a result, we believe that granting MTA's request will not necessarily result in consumers being denied the benefits of competition.

GCI argues that approval of MTA's request for suspension would impair GCI's ability to compete.[140] Part of GCI's impairment argument was based on an assertion that the FCC concluded that nationwide, carriers are impaired without access to DS0 and at times impaired without access to DS-1 capacity loops.[141] However, the FCC decision which GCI references states that requesting carriers seeking to serve the

[137]Tindall Responsive Testimony at 11. GCI's Application was filed in Docket U-05-4.

[138]Specifically, GCI stated it was fit, willing, and able to serve throughout the MTA and other study areas it proposed to serve and that its ability to serve was "not dependent on the availability of unbundled network elements, wholesale resale, or on a decision by the Commission on whether or not the affected local exchange companies have or should retain a rural exemption." Docket U-05-4, GCI Application at 4.

[139]Rowe Reply Testimony at 30-33. Tr. at 438, 554-555, 836.

[140]Tindall Responsive Testimony at 6-7.

[141]*Id.* at 7-8

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mass market "face varying levels of impairment."[142] Further, the FCC has stated that "Actual marketplace evidence is the most persuasive and useful evidence" of impairment.[143] We conclude that the FCC's statements do not provide a measurable standard against which to gauge the specific extent of impairment, if any, GCI might face in MTA's area due to lack of access to UNEs.

As part of its impairment argument GCI states that UNEs are an extremely important entry method for competitors to facilitate facilities based competition.[144] At the same time, GCI implies that it will have strong incentives to provide service using its own facilities rather than leasing MTA facilities.[145] We find GCI's arguments inconsistent. Further whether UNEs are important to GCI is not the relevant question. The key question is how the public interest, convenience, and necessity is affected by a decision to approve or deny the MTA request for suspension.

GCI states that the 47 U.S.C. § 251(c) unbundling and interconnection obligations are important to counter the competitive advantage the incumbent has through control over the existing, ubiquitous network.[146] However, to the extent there is a competitive advantage to MTA, we are not convinced the appropriate response is to allow GCI to purchase from MTA UNEs when doing so could lead to an undue

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[142] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338, *Implementation of the Local Competition Provision of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Deployment of Wireline Services offering Advanced Telecommunications Capability*, CC Docket No. 98-147, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking,* FCC 03-36, at paragraph 211, (rel. August 21, 2003).

[143] *Id.* at paragraph 7.

[144] Tindall Responsive Testimony at 8.

[145] *Id.* at 14-17.

[146] *Id.* at 10.

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economic burden to MTA, affecting its ability to provide carrier of last resort services to consumers.

GCI contends that it cannot effectively compete through purchase of wholesale services as this provides it with inadequate margins to compete.[147] Part of GCI's argument rests on its disagreement with our past decisions that determined wholesale pricing in other markets.[148] We believe our past decisions remain reasonable and place little weight on GCI's argument. Further, a wholesale price for the MTA market is still under negotiation. It is premature to assume that GCI will be unable to achieve a reasonable wholesale rate. We conclude there is inadequate evidence to support GCI's contention that it will be unable to effectively compete through the purchase of wholesale services.

GCI argues that it has a right to access 47 U.S.C. § 251(c) services consistent with statute, FCC impairment determinations, and Congress' intent to promote competitive entry. GCI asserts that denying it this right would be prejudicial to GCI and its prospect for rapid and effective competition.[149] However, given the specific federal provisions allowing for suspension and modification of MTA's obligations under 47 U.S.C. § 251(c), GCI has no uncontested right to 47 U.S.C. § 251(c) services. Further, as indicated earlier, GCI has indicated it will compete throughout MTA's area with or without access to 47 U.S.C. § 251(c) services. We conclude that approving the MTA request will not necessarily delay GCI's ability to compete so much as reduce one of the options by which it may compete.

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[147]Tindall Responsive Testimony at 18.

[148]*Id.*

[149]*Id.* at 13-14.

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GCI is one of the largest telecommunications companies in the state, with significantly larger operations and financial resources than MTA.[150] GCI and or its affiliates provide local exchange, long distance, cable television, cable modem, cellular, and internet services, providing GCI an opportunity to bundle a wide array of services once it begins to compete in MTA's area. While GCI asserts that MTA also provides a wide scope of services that will offer MTA an opportunity to bundle,[151] we believe that GCI has an advantage in this area given its size, extensive advertisement program and experience offering bundled services. We also note that MTA is not a leader in any services, other than local service, in its area.[152] GCI's size, economies of scale, and resources support our previous conclusion that GCI would be able to successfully compete in MTA's service area, even if we were to approve MTA's request for suspension and modification. We find that it is not in the public interest to provide GCI the added competitive advantage of access to MTA UNEs given the potential negative effects on investment incentives, MTA quality of service, and other factors addressed later in this order.

GCI argues that MTA overstates the importance of the relative size of the two companies and that the 47 U.S.C. § 251(f)(2) criteria contains no reference to relative size.[153] GCI asserts that federal law does not permit us to grant a suspension or modification because one entity is smaller than another.[154] While we agree that MTA's request should not be approved simply because GCI is a larger company, we

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[150]Rowe Reply Testimony at 8-13; Tr. at 310-312.

[151]Chapados Rebuttal Testimony at 12.

[152]Rowe Reply Testimony at 10-12; Hanson Reply Testimony at 8-9, 12-14; Tr. at 277.

[153]Nakahata Responsive Testimony at 4.

[154]*Id.* at 7.

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disagree with GCI's interpretation of 47 U.S.C. § 251(f)(2). By plain reading 47 U.S.C. § 251(f)(2) does not limit what factors we may consider as part of our public interest analysis. The relative size and scope of operations of the two carriers affects their ability to compete, their financial resources, their economies of scale, and their ability to withstand loss of revenue and market share. We conclude we may consider size, to the extent it affects the public interest, convenience and necessity and undue economic burden when determining our review under 47 U.S.C. § 251(f)(2).

GCI contends that MTA's "David-versus-Goliath" arguments should be given little weight as MTA is in a better position to face competition in its service area than ACS was in Anchorage, Fairbanks, and Juneau given an analysis of access to capital, MTA's business strategy, MTA's relationship to its customers and other factors. In addition, GCI asserts that ACS "handily survived" the introduction to competition in its areas.[155] GCI also states that based on its review of competitive factors, GCI and MTA are well matched competitively.[156] GCI believes that the fact that GCI is a much larger company statewide is not dispositive in light of the fact that MTA is not attempting to compete with GCI statewide and local telephony in the MTA area is only one of several business opportunities GCI is pursuing which will require GCI's attention.[157] We are not persuaded by these arguments. GCI offers a "static" comparison between GCI and MTA before competition occurs in the MTA area, ignoring the potential undue economic burden on MTA associated with provision of UNE services. We also do not agree that ACS and MTA are sufficiently similar such that we can conclude that MTA's experience under UNE pricing will mirror, or be better than that of ACS.

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[155]Chapados Rebuttal Testimony at 5-7.

[156]*Id.* at 10-12.

[157]*Id.* at 12.

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While we disagree with a number of the public interest arguments raised by GCI, we do find some have merit. We agree that GCI's entry using UNEs would allow it to operate more independently from the incumbent's retail rate structure, offer different services and product packages than the incumbent; more flexibly purchase services from the incumbent, and to some extent, offer better service quality when service is offered in conjunction with use of GCI's own facilities.[158] Purchasing of UNEs will also provide GCI another option for provisioning service in areas where it does not have facilities.[159] While we agree that GCI and its customers may benefit (at least in the short term) from the ability to access UNEs, we do not believe that this advantage is outweighed by other public interest factors which support granting MTA's request for suspension and modification. We believe that in the long term the undue economic burden placed on MTA as a result of sale of UNEs could have negative consequences on some of the perceived benefits of UNE sale to GCI. For example, potential reductions in MTA's service quality and availability due to any undue economic burden placed on MTA could affect GCI's service quality when reselling MTA UNEs.

Granting the MTA request would avoid a risk associated with provision of UNE services. The Federal Communications Commission (FCC) has stated, and we

[158]Chapados Rebuttal Testimony at 9; Tr. at 901.

[159]Chapados Rebuttal Testimony at 10-11.

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agree, that availability of UNEs can undermine the incentives of both the incumbent carrier and the new entrants to develop and invest in infrastructure:

> [W]e have come to recognize more clearly the difficulties and limitations inherent in competition based on the shared use of infrastructure through network unbundling. While unbundling can serve to bring competition to markets faster than it might otherwise develop, we are very aware that excessive network unbundling requirements tend to undermine the incentives of both ILECs and new entrants to invest in new facilities and deploy new technology. The effect of unbundling on investment incentives is particularly critical in the area of broadband deployment, since ILECs are unlikely to make the enormous investment required if their competitors can share in the benefits of these facilities without participating in the risk inherent in such large scale capital investment.[160]

Both GCI and MTA provided testimony on investment incentives.

In response to MTA's economic analysis, GCI disagrees with MTA that it would have little incentive to compete over its own network if it had access to 47 U.S.C. § 251(c) services.[161] GCI states that its decision of whether to invest in upgrading the cable television plant or lease UNEs would depend upon the incremental cost to upgrade the cable plant and would also be motivated by its ability to avoid disputes associated with lease of facilities from the incumbent.[162] GCI states that under the present circumstances, it would likely have an incentive to upgrade its cable plant in MTA's area.[163]

MTA states that GCI's argument regarding investment signals in this proceeding is confusing and provides conflicting signals as GCI both contends it needs

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[160] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338, *Implementation of the Local Competition Provision of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Deployment of Wireline Services offering Advanced Telecommunications Capability*, CC Docket No. 98-147, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking,* FCC 03-36, at paragraph 3, (rel. August 21, 2003).

[161] Tindall Responsive Testimony at 14.

[162] *Id.* at 15-17.

[163] *Id.* at 15-16.

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UNE loops to compete effectively, while also testifying that MTA's model is flawed since GCI would use its own plant in the vast majority of MTA's region.[164] MTA also states that GCI represents that within two years, it will need UNEs to reach only 20 percent of the region.[165] MTA contends that "It is therefore possible to represent that this proceeding is unfolding effectively to put at risk a high-cost carrier (MTA) so that GCI can gain access to a relatively small minority of MTA's loops."[166] MTA also argues that GCI will have incentive to purchase UNEs as they provide it an opportunity for risk-free profit while allowing GCI to conserve its capital.[167]

Approving MTA's request for suspension would appear consistent with the public interest given the potential negative effects on investment incentives associated with UNE services. Under federal law, the ILEC must price its UNE service "based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the ILEC's wire centers". 47 CFR § 51.505(b)(1). A competitor with the ability to purchase service at a UNE price based on the most efficient technology may have incentives to delay investment or to not take the risks and incur the costs associated with building or upgrading its own facilities. As indicated by MTA, GCI may also have an economic incentive to purchase UNEs. We were not persuaded by GCI's arguments that it will have strong incentives to upgrade and expand its own network as we find that GCI's statements are collectively inconsistent. We also believe the incumbent may defer construction or technological upgrade of facilities if it must share the benefits (but not the risks) of those investment decisions with its competitor by virtue of offering UNEs.

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[164]Balhoff Reply Testimony at 14-15.

[165]*Id.* at 16.

[166]Balhoff Reply Testimony at 16.

[167]Balhoff Reply Testimony at 20-21; Tr. at 636-638.

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In this case, the potential for undue economic burden strongly suggests that MTA provision of UNE services would affect its incentives and ability to invest in infrastructure.[168] We conclude that the risk of negative incentives on infrastructure investment associated with provision of UNEs, argues in favor of approving the MTA request for suspension and modification as in the public interest.

The undue economic burden associated with provision of UNE services may also affect the quality of service to customers, to the extent it reduces MTA's ability to conduct and timely implement necessary system upgrade and maintenance.[169] This is especially important given MTA functions as the carrier of last resort responsible for universal service in its area.[170]

GCI disputes the extent to which MTA's status as a carrier of last resort would be affected if its request for suspension and modification were denied.[171] For example, GCI states that MTA bears very little risk for all line extension costs exceeding the first $3250 per member given the provisions of the MTA line extension tariff.[172] We note however that a carrier of last resort's obligations is not limited to simply providing line extensions.[173] Further MTA has only had 22 line extension customers over the last five years.[174] To the extent that provision of UNEs creates a significant adverse economic impact on MTA, we believe it may affect MTA's ability to timely and

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[168]Tr. at 640.

[169]For example, *see* Berberich Testimony at 20-21.

[170]Berberich Testimony at 10-11.

[171]Nakahata Responsive Testimony at 11.

[172]*Id.*

[173]Tr. at 319.

[174]Tr. at 214.

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adequately maintain and upgrade its equipment, affecting its duties as a carrier of last resort.

GCI also believes we should give little weight to MTA's arguments concerning universal service, partly as GCI discounted MTA's economic analysis and partly as GCI believes we should be concerned with whether customers will have affordable service and not which company is the provider.[175] GCI states it is committed to universal service and it is willingness to share carrier of last resort services.[176] However, while GCI has indicated it may "share" carrier of last resort responsibilities, it has not offered to replace MTA as the carrier of last resort. Further, GCI's offer to share in carrier of last resort obligations may be limited to serving unserved areas and contributing capital dollars to make service possible in unserved areas.[177] The record does not demonstrate that GCI has the capabilities or desire to take on all carriers of last resort responsibilities in MTA's area. We conclude that granting the MTA request for suspension and modification benefits the public interest as it would help avoid reductions in service quality and potential negative affects on MTA's ability to function as the carrier of last resort providing universal service.

Taking into consideration all of the above factors, we conclude that on balance, granting MTA's request for suspension and modification is consistent with the public interest, convenience and necessity.

Impact of Our Decision on Competition

The Act recognizes four forms of competitive entry into local exchange markets; facilities-based entry, retail resale of the incumbent's services, wholesale resale of the incumbent's services, and access to the incumbent's network on an

[175]Tindall Responsive Testimony at 25.

[176]Tindall Responsive Testimony at 26-27.

[177]Tr. at 895.

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unbundled basis (UNEs).[178] The rural exemption provides that 47 U.S.C. § 251(c) does not apply to a rural telephone company, shielding rural ILECs from two forms of competitive entry: (1) access UNEs, and (2) wholesale resale. While these forms of competitive entry are unavailable in areas where the rural exemption is in effect, competitive entrants are still able to enter the rural market through the use of its own facilities or by reselling the ILEC's services after purchasing those services at retail rates.

Due to the forfeiture of its rural exemption as to GCI, MTA is obligated to provide UNEs and wholesale resale. MTA's suspension petition focuses on UNEs and does not seek suspension of its obligation to provide wholesale resale service; MTA and GCI are currently arbitrating a wholesale rate for MTA's resold services. Thus, suspension of MTA's obligation to provide UNEs does not affect GCI's ability to enter the MTA market through building its own facilities, resell MTA's service purchased at retail rates, or resell MTA's services purchased at wholesale rates.

Conclusion – Suspension of MTA's Duty to Provide UNEs

We grant MTA's petition to suspend its duty to provide UNEs (47 U.S.C. § 251(c)(3)) and the application of 47 U.S.C. § 251(c)(1), (2), (5), and (6) as they apply to UNEs. This suspension shall remain in effect for three years. The initial three-year period will allow us the opportunity to monitor the progress of facilities-based competition, and the extent of GCI's use of wholesale resale, in MTA's service area.

We deny MTA's request that we commit to two additional one-year periods of suspension of MTA's duties under the Act upon a continued showing of undue economic burden. First we find such a commitment to be premature given we do not know what conditions may exist three years from now. Second, MTA's request does

[178] 47 U.S.C. § 251(a),(b),(c).

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not provide for the opportunity to consider whether such additional extensions are consistent with the public interest, convenience and necessity as required by 47 U.S.C. §251(f)(2)(B). Should MTA believe that the suspension granted in this order should be extended beyond three years, under federal law, MTA may file a petition requesting continuation of the suspension prior to the conclusion of the three year period.

We also note that while GCI raised the issue of modification at the hearing in this matter,[179] it presented little evidence to demonstrate the appropriateness of such modification. GCI argued that the suspension and modification provisions should be narrowly construed, and we should err on the side of competition.[180] GCI proposed a "60/40" modification, with GCI being limited to serving 40 percent of its telephone numbers in MTA's service area through the use of UNES with this limit beginning in the second year of GCI operation.[181] We decline to adopt GCI's proposal given GCI's failure to present limited evidence on the appropriateness of such as modification. Because of the lack of evidence on this issue, we cannot determine the degree by which economic burden on MTA from UNE competition could be mitigated by a 40 percent UNE limit.

[179]Tr. at 881-883; 899-906; 905-930; 946-947; 1076-1078.

[180]Tr. at 865.

[181]Tr. at 929.

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Electronic Rulings

Electronic Ruling Regarding Unopposed Motion for Waiver

We affirm our October 19, 2005 electronic ruling granting the unopposed motion for waiver of 3 AAC 48.049(g)[182] and Paragraph Number 9 of Order U-05-46(4), dated September 12, 2005.[183] According to our regulations and Paragraph Number 9 of Order U-05-46(4), if a party intends to enter as evidence a record designated as confidential, that party must provide five days' notice to the party with confidentiality interests. GCI requested that this deadline be extended to allow it to review reply testimony and confer with MTA prior to designating the records it intended to enter as evidence at hearing.

GCI presented good cause to waive the regulation and the applicable portion of the Order Governing Confidential Discovery Material. If a party is given the opportunity to review reply testimony and confer with opposing counsel before designating the information it intends to enter as evidence, the hearing is likely to be conducted in a more efficient and expeditious manner. The parties will have had the opportunity to informally resolve any procedural issues that may arise in conjunction with the documents and are less likely to expend hearing time addressing those matters.

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[182]Our October 19, 2005 electronic ruling referenced 3 AAC 48.045(g). The correct reference is 3 AAC 48.049(g), which states:

> If a party intends to enter as evidence a record designated as confidential under 3 AAC 48.040(b)(5) or (b)(10), that party shall provide the person with the confidentiality interests in the records at least five days notice of that party's intent. Unless within five days after service of that notice the person with the confidentiality interests in the record files a petition for confidential status of the record under 3 AAC 48.045(a), the record becomes public when presented to the Commission.

[183]Order U-05-46(4), *Order Governing Confidential Discovery Material*, dated September 12, 2005.

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Electronic Ruling Requiring Expedited Response

We affirm our October 20, 2005 electronic ruling requiring expedited response to the petition for confidentiality filed by MTA. Given the then imminent hearing in this matter and the need to quickly address the merits of the petition, we concluded that we must take the necessary measures to ensure the motion was ripe for adjudication as expeditiously as possible.

Electronic Ruling Granting Petition for Confidentiality

We affirm our October 21 2005 electronic ruling granting the petition for confidentiality filed by MTA. We evaluate petitions for confidential treatment according to the balancing test presented in 3 AAC 48.045(b) and require the petitioner to present good cause to classify a record as confidential. Good cause includes a showing that disclosure of the record might competitively or financially disadvantage or harm the person with confidentiality interests or might reveal a trade secret and that need outweighs the public interest in disclosure.

We conclude that MTA presented good cause that it will be financially and/or competitively disadvantaged if this information is disclosed to the public. Conversely, there is little, if any, public interest in disclosure of the data. The reply exhibits filed by MTA as MCB-27, MCB-30, and MCB-31 attached to the prefiled reply testimony of Michael C. Burke are designated confidential. The reply exhibit RDM-13 attached to the prefiled reply testimony of R. Desmond Mayo is designated confidential.

Electronic Ruling Denying Motion for Expedited Consideration

We affirm our electronic ruling denying the motion for expedited consideration of the motion to permit post-hearing briefs filed by GCI. Given the press of other regulatory business, the Commission was unable to address this motion on an expedited basis. Moreover, the merit of the request, the opportunity to present post-hearing briefs, was not so time-sensitive as to warrant expedited consideration.

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Electronic Ruling Denying Motion to Present Post-Hearing Briefs

We affirm our electronic ruling denying the motion to present post-hearing briefs. We have a full and adequate record upon which to render an informed decision in this proceeding without additional briefing by the parties.

This order constitutes the final decision in this case. This decision may be appealed within thirty days of the date of this order in accordance with AS 22.10.020(d) and the Alaska Rules of Court, Rule of Appellate Procedure (Ak. R. App. P.) 602(a)(2). In addition to the appellate rights afforded by AS 22.10.020(d), a party has the right to file a petition for reconsideration as permitted by 3 AAC 48.105. If such a petition is filed, the time period for filing an appeal is then calculated under Ak. R. App. P. 602(a)(2).

ORDER

THE COMMISSION FURTHER ORDERS:

1. The motion for clarification of its petition for suspension, filed by Matanuska Telephone Association, Inc. on October 27, 2005, is granted.

2. The petition filed by Matanuska Telephone Association, Inc. on May 27, 2005, is granted in part, effective December 20, 2005 to allow for a three-year suspension of the application of 47 U.S.C. § 251(c)(3), and the application of 47 U.S.C. § 251(c)(1), (2), (5), and (6) to unbundled network elements, as more fully discussed in the body of this order.

3. That aspect of the petition filed by Matanuska Telephone Association, Inc. on May 27, 2005, regarding potential additional extensions to the suspension beyond the third year is denied without prejudice towards the utility filing for such additional extensions at a later date.

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4. The electronic ruling requiring granting the unopposed motion for waiver filed by GCI Communications Corp. d/b/a General Communication, Inc. and d/b/a GCI is affirmed.

5. The electronic ruling requiring expedited response to the petition for confidential treatment filed by Matanuska Telephone Association, Inc., is affirmed.

6. The electronic ruling granting the petition for confidential treatment filed by Matanuska Telephone Association, Inc., is affirmed.

7. The electronic ruling denying the motion for expedited consideration of the motion to file post-hearing briefs filed by GCI Communications Corp. d/b/a General Communication, Inc. and d/b/a GCI is affirmed.

8. The electronic ruling denying the motion to file post-hearing briefs filed by GCI Communications Corp. d/b/a General Communication, Inc., and d/b/a GCI is affirmed.

DATED AND EFFECTIVE at Anchorage, Alaska, this 20th day of December, 2005.

BY DIRECTION OF THE COMMISSION
(Commissioner Dave Harbour, dissenting, in part, in separate statement.)

(S E A L)

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Matanuska Telephone Association, Inc.

Comparative Analysis of GCI Economic Benefit from UNE Competition

Description	MTA	ACS of Fairbanks	ACS of Juneau	ACS of Anchorage
UNE-L Payment	$ (38.18)	$ (23.00)	$ (18.00)	$ (18.64)
USF Receipt	32.01	8.61	3.99	0.76
Access Savings	19.38	25.51	19.63	20.18
before Local End-User Charges	**$ 13.21**	**$ 11.12**	**$ 5.62**	**$ 2.30**

USF Relative to UNE-L

USF as % of UNE	84%	37%	22%	4%

Exhibit B